

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMÈS INTERNATIONAL, et al.,

Plaintiffs,

v.

22 Civ. 384 (JSR)

MASON ROTHSCHILD,

Defendant.

Trial

New York, N.Y.
February 6, 2023
9:30 a.m.

Before:

HON. JED S. RAKOFF,

District Judge
-and a Jury-

APPEARANCES

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CHRISTOPHER SPRIGMAN

1 (Trial resumed; jury not present)

2 THE COURT: All right.

3 So let me thank counsel for both sides for their
4 letters submitted over the weekend, which I have carefully
5 reviewed.

6 Is there anything further that defense counsel wants
7 to say on the issue of whether or not to allow the supplemental
8 report and corresponding supplemental testimony by Dr. Neal?

9 MR. SPRIGMAN: Your Honor, very briefly, the issue
10 here is one of the evidence and the effect of Dr. Isaacson's
11 report. The Hermès mark is either in the claim or out.

12 In the complaint, there are many paragraphs -- 148,
13 165, 166, 169 -- where Hermès makes clear that the Hermès word
14 mark is in the claim. Now it's out.

15 The problem is that we can't tell from Dr. Isaacson's
16 report, as Dr. Neal will testify, whether confusion that is
17 purported to be measured is caused by the Birkin word mark, the
18 Birkin trade dress or the Hermès word mark.

19 Hermès now says, well, the Hermès word mark is just an
20 aggravating factor. Okay. But the problem there is, first, we
21 need to know if the marks that are actually in the claim are
22 causing confusion. Then we can assess whether the Hermès mark
23 is an aggravating factor.

24 As the record stands now, your Honor, given their
25 posture in this litigation, the Hermès word mark's presence in

1 the test stimulus but not in the control stimulus, your Honor,
2 is in fact a confound to this report.

3 That we think is an important element of evidence for
4 the jury to understand. We think that unless Dr. Neal is
5 allowed, now that Hermès has clarified their claim, to testify
6 to this, we would be materially prejudiced. That is why we put
7 in the supplemental report.

8 By the way, Dr. Neal, I should add, in his initial
9 report made an analysis that relates directly to this issue.
10 In fact, this supplemental report is an extension of that
11 analysis. He said that Hermès' expert Dr. Isaacson had tested
12 all of potential stimuli together and so that you could not
13 disentangle what element of the so-called confusion had been
14 caused by each of these elements. Now that the Hermès mark is
15 out, that critique sharpens, and that's what we want to be able
16 to tell the jury, your Honor.

17 THE COURT: Let me hear from plaintiff's counsel.

18 MS. WILCOX: Thank you, your Honor.

19 This case has not changed in the scope of the rights
20 that Hermès is claiming are infringed and diluted by Mason
21 Rothschild's MetaBirkin NFTs. We have said since July, when
22 Dr. Isaacson started this survey and later produced his report,
23 maintained he was testing the web page metabirkins.com that the
24 defendant put out and where a person who might be interested in
25 buying an NFT would go to see what it is all about.

1 It is the use of the Birkin name and a slogan as part
2 of MetaBirkins of course, and that the actual designs of the
3 digital images copy the trade dress, those are the key
4 elements. The fact that there was a disclaimer that mentioned
5 Hermès the company that puts out these products three times was
6 also very relevant to Dr. Isaacson. He grouped all of those
7 things together because that is what the real world is.

8 The survey is meant to capture as much of the real
9 world as the purchaser sees things as possible. So that's what
10 he did.

11 THE COURT: So my view is this: First, whatever may
12 have been said in the complaint throughout this case, it's been
13 the plaintiff's consistent position and the Court's
14 understanding that the mark that was being infringed allegedly
15 was the Birkin mark, as my instructions indicate, and that the
16 reference to Hermès was part of the overall picture, but was
17 not a separate claim.

18 So I don't see the basis at this very late stage for a
19 supplemental report from Dr. Neal. I do think that for what
20 was just represented by defense counsel about what's in his
21 original report that he still then can make the argument that
22 different things are being globbed together and that that makes
23 the survey less useful, less valuable than it might otherwise
24 be or whatever he wants to conclude in that regard.

25 Someone should go tell Dr. Neal, since he's going to

1 be on the stand in ten minutes, that that's how we're going to
2 handle it.

3 Now, the other issue that I wanted to be sure to
4 reach, because we will be going into summations after
5 Dr. Neal's testimony, is Instruction No. 14, particularly the
6 third paragraph of it.

7 I spent a good deal of the weekend reflecting on the
8 various excellent arguments I have received from both sides at
9 the charging conference, and the instructions that I sent you
10 over the weekend reflect my rulings.

11 I will note one thing for the record, since it was one
12 of the issues that I was uncertain about, in the end I have put
13 the instructions regarding the three claims first, before the
14 instruction on First Amendment protection for several reasons.

15 One is I think that's the more logical way for the
16 jury to proceed. If there's no infringement they don't reach
17 the First Amendment question.

18 Secondly, as we all know, the Supreme Court has taken
19 cert. in the *Jack Daniels* case, so it's possible the *Rogers*
20 test may not survive, though I personally hope it does. In
21 that case, if they found infringement, but found that it was
22 barred by the First Amendment defense, the Court could then
23 reinstate the infringement conclusion without having to go
24 through a whole new trial. We might still have to have a trial
25 of damages, but that would be a much more abbreviated matter.

1 But I did add to Instruction No. 9, where I am describing the
2 basic claims, a sentence to flag the First Amendment defense
3 was coming. I think that was a fair resolution of the
4 competing arguments.

5 Now, the more I thought about the *Rogers* test and the
6 various cases not just in the Second Circuit but elsewhere that
7 have elaborated and expanded the *Rogers* test over the weekend,
8 the more I thought that on the facts of this case the real
9 question is the defendant's intent.

10 Because while both *Rogers* and the related cases speak
11 in, frankly, less than clear terms like "explicitly misleading"
12 or "artistically relevant" and the like, the real question
13 here, so far as the defense is concerned, is did Mr. Rothschild
14 intend to mislead? In which case, of course, he has no First
15 Amendment protection, any more than a con man has First
16 Amendment protection from telling lies to the public to make
17 money. Or did he not intend to mislead, in which case I think
18 there can be no question that there was at least some artistic
19 aspect to what he was offering.

20 As indicated in the instruction by his covering the
21 Birkin bags with fur, he says he covered it with fur to show
22 how ridiculous the consumer interest in Birkin bags was and the
23 plaintiff says, no, it was just part of his whole way to try to
24 sneak in as he sought to dupe the public.

25 They would be fair arguments to the jury, but that all

1 goes to his intent. That's why I said I think the focus is
2 really on intent.

3 So I try to capture that, but I have added some
4 additional words since I sent this to you on Saturday to the
5 third paragraph of Instruction No. 14. Everything else will
6 remain exactly as it is, and all objections thereto are
7 preserved.

8 But here is now what I have for 14:

9 "It is undisputed that the MetaBirkins NFTs, including
10 the associated images, are in at least some respects works of
11 artistic expression, such as, for example, the addition of the
12 total fur covering on the Birkin bag images. Given that,
13 Mr. Rothschild is protected from liability on any of Hermès'
14 claims unless Hermès proves by a preponderance of the evidence
15 that Mr. Rothschild's use of the Birkin mark was not just
16 likely to confuse potential consumers, but was intentionally
17 designed to mislead potential consumers into believing that
18 Hermès was associated with Mr. Rothschild's MetaBirkin
19 projects. In other words, if Hermès proves that Mr. Rothschild
20 actually intended to confuse potential customers, he has waived
21 any First Amendment protection."

22 I think, as will be obvious, that doesn't use some of
23 the buzzwords from *Rogers* and related cases, but I think the
24 whole *Rogers* issue in this case turns on his intent.

25 So let me hear any comments on the new version of

paragraph 3 first from plaintiff's counsel and then from defense counsel. Again gem thank you, your Honor.

MS. WILCOX: Thank you, your Honor.

Thank you for that careful consideration and revised text, which we agree that the intent is key in this case. We were trying to come up with our own way of bringing it back in and following your summary judgment discussion of the Second Circuit law. So I think that is a good rewrite with respect to that second prong.

We still have concern that the first prong seems to have disappeared.

THE COURT: I think the first prong, the defense has shown and made enough that no reasonable juror could conclude that there wasn't any artistic expression in Mr. Rothschild's stuff. That's why I didn't charge the first prong.

MS. WILCOX: We might make a note of an objection then.

THE COURT: Yes. I assume you would object to that, so objection duly noted.

Let me hear from defense counsel.

MS. WILCOX: If you wouldn't mind.

THE COURT: Sorry. Go ahead.

MS. WILCOX: I am also considering whether this revision deals with another issue that we were thinking about, where the dilution cause of action has no requirement of

misleading conduct, but it does relate to an intent to associate versus the intent to cause confusion. I think you might have addressed that with this.

THE COURT: I use the word "associated" in the new version, yes.

MS. WILCOX: Okay. Thank you.

MR. SPRIGMAN: Your Honor, just in response to that last quickly. Yes, the dilution cause of action does require an intent to associate, but in addition, it requires harm to the mark. It requires an impairment of the mark's distinctiveness. So we think that your instructions as they stand make that clear to the jury, or at least clear enough. These are lay people, and this is complicated.

But back to the instruction itself, we here at this table believe that the instruction gives the jury words they can use to actually apply the principle, and we are satisfied with it.

That said, Judge, we do remain, we have remaining arguments on the JMOL and in particular something that I think is central to the relationship between *Rogers* and this case that I would just like at some point to get to.

THE COURT: If we had had more time right now, I was going to hear the further argument on the Rule 50 motions, but as I promise you, you will have that opportunity before I rule.

MR. SPRIGMAN: Thank you, your Honor.

1 THE COURT: So we will get to that later. Let's see
2 if the jury is here.

3 THE DEPUTY CLERK: They are.

4 MR. HARRIS: Your Honor?

5 THE COURT: Yes.

6 MR. HARRIS: May I address one private matter at a
7 sidebar, please.

8 THE COURT: Sure.

9 (At sidebar)

10 MR. HARRIS: Your Honor, Mr. Rothschild got food
11 poisoning last night, and I'm hoping he is going to be able to
12 make it here today, but I don't want to the jury to have any
13 type of misimpression.

14 THE COURT: Why don't I just say, without getting into
15 the details, that Mr. Rothschild is excused and everyone agrees
16 we can proceed in his absence.

17 MR. HARRIS: He may appear.

18 THE COURT: You want me to say delayed not because of
19 his fault?

20 MR. HARRIS: Yes, thank you, your Honor.

21 (In open court)

22 (Continued on next page)

(Jury present)

DAVID THOMAS NEAL, resumed.

THE COURT: Good morning, ladies and gentlemen.

Welcome back. I hope you had a good weekend, but now we have work to do.

I should mention that, through no fault of his own in any respect, Mr. Rothschild is delayed this morning. He will be with us later, but counsel have agreed we can proceed even in his absence.

So, counsel.

DIRECT EXAMINATION (Continued)

BY MR. MILLSAPS:

Q. Good morning, Dr. Neal.

A. Good morning.

Q. When we left off on Friday afternoon, we had just gone through an overview of your background and credentials. Do you recall testifying that you have published 26 peer-reviewed papers?

A. Yes, I do.

Q. Have you also acted as a scientific peer reviewer for other peoples' articles?

A. I have. In fact, I was a peer reviewer on many journals in psychology and consumer behavior.

Q. Has your previous work as an expert witness involved the design and implementation of surveys to assess whether there is

1 a likelihood of confusion between two trademarks?

2 A. Yes. I have done that many times. A rough estimate would
3 be 60 to 90 different surveys of that kind specifically.

4 Q. And the jury heard Dr. Isaacson talk about his use of the
5 *Eveready* method for testing likelihood of confusion. Have you
6 used that specific method in conduct surveys before?

7 A. I have. That's a common method, and I've probably used it
8 50 times I would say.

9 Q. Before we get into the details of what you have to say,
10 have you heard of Dr. Isaacson before this case?

11 A. I had. We actually worked on the same side of a case a
12 couple of years ago. So I was aware of him from that prior
13 case.

14 Q. And on Friday afternoon, did Dr. Isaacson approach you here
15 in the courthouse?

16 A. He did, yes. I think just to say hello, since we had never
17 met in person before, despite having worked on that case.

18 Q. Now, you testified on Friday about your assignment in this
19 case. But would you just remind us of what your goals were.

20 A. Sure. Pretty simple. To conduct a scientific review of
21 the two surveys that Dr. Isaacson did, and in particular to
22 look at his conclusion from the first survey, the one of the
23 NFT purchases, where he concluded that there was a likelihood
24 of confusion. I looked very closely at that confusion to work
25 out if it was accurate or not.

1 Q. Did you prepare some slides for your presentation today?

2 A. I did.

3 MR. MILLSAPS: Ashley, would you please put up the
4 first slide here.

5 BY MR. MILLSAPS:

6 Q. Dr. Neal, could you explain your methodology for evaluating
7 Dr. Isaacson's surveys?

8 A. Certainly. This is pretty similar to the process you go
9 through in any scientific technical review of someone else's
10 work. You begin by very carefully going through the
11 questionnaires themselves kind of line by line looking for any
12 biases or ambiguous language or any design flaws.

13 The second thing you do is you actually go into the
14 raw data. So basically every single person's answer to every
15 single question, you look at that, and you reanalyze the data
16 to see if the person who analyzed it initially, so
17 Dr. Isaacson, did it correctly.

18 And then the final thing is you write up whatever you
19 find in a formal report.

20 MR. MILLSAPS: And Ashley could we go to the next
21 slide.

22 BY MR. MILLSAPS:

23 Q. At a high level, Dr. Neal, how would you summarize your
24 conclusions about Dr. Isaacson's surveys.

25 A. Sure. Perhaps the most important one thing is that NFT

1 purchaser survey, where Dr. Isaacson told you that he found
2 evidence of confusion, that people would think the MetaBirkins
3 NFT is in -- that Hermès is involved in that NFT somehow, in
4 that survey, Dr. Isaacson misclassified a large number of
5 respondents as confused who actually were not confused.

6 I was able to fix that error, and I'll walk you
7 through how I did it. Once you correct for that mistake, you
8 get 9.3 percent confusion, not the 18.7 percent number that he
9 reported.

10 Q. And, Dr. Neal, why would it matter if confusion dropped
11 from what Dr. Isaacson reported, which was 18.7 percent, down
12 to 9.3 percent?

13 A. Right. So it seems like a small drop, right? Just from
14 18.7 down to 9. It is actually hugely consequential because
15 survey experts typically use a threshold of around 15 percent
16 as the minimum for deciding that there is a likelihood of
17 confusion, right?

18 So when Dr. Isaacson had a number like 18.7 percent,
19 he was just a little bit above that minimum number. But when I
20 reanalyzed his data, his real number is 9.3, which falls well
21 below that typical minimum threshold for determining that
22 there's some confusion.

23 So when you get a number like that, like 9.3, the
24 proper conclusion is that there is no confusion. Because it
25 doesn't have to be zero; it just has to be so small that it is

1 considered immaterial. And 15 is that typical magic number, if
2 you like, for reaching that determination.

3 MR. MILLSAPS: Ashley, would you go to the next.

4 BY MR. MILLSAPS:

5 Q. Dr. Neal, were there other flaws in Dr. Isaacson's survey?

6 A. Yes. There were a couple of other flaws that -- like buyer
7 survey language, and I will talk you through that.

8 I wasn't able to fix those flaws by reanalyzing the
9 data, but I know that they pushed the confusion numbers up in
10 an artificial way, so I would say even that 9.3 percent number
11 is a bit high and the real number is no doubt a little bit
12 lower than that.

13 Q. And, Dr. Neal, were you aware that Dr. Isaacson conducted a
14 survey as well among handbag purchasers?

15 A. Yes. So those first three conclusions are all about that
16 NFT purchaser survey, so people out there interested in buying
17 NFTs.

18 He also did a survey of people who spend a lot of
19 money on handbags, \$10,000 or more. In that survey, he found
20 no confusion whatsoever. Inexplicably, it doesn't really show
21 up in his report, I think it's important for us to look at that
22 survey as well.

23 Being a good scientist means you look at all of the
24 data from all of the studies you run, and that second survey of
25 handbag purchasers tells us very clearly that likely purchasers

1 of Hermès products, people who buy the expensive handbags, are
2 not likely to be confused and think that Hermès puts out the
3 MetaBirkins NFT.

4 Q. Dr. Neal, when you read Dr. Isaacson's report in this case,
5 did he report on his findings there in the handbag survey?

6 A. Not really. They were kind of hidden in the exhibits in
7 his report, so I had to go in myself and calculate the
8 confusion number for the handbag purchaser survey to discover
9 that it was so low. He did have the raw numbers to calculate
10 it in his report, but in the main body of his report he didn't
11 even describe any conclusions about that study.

12 Q. And before we dive into this first flaw, you've said that
13 there are several flaws with the survey. When you say "flaw"
14 are you being nitpicky about his survey, or are these important
15 things?

16 A. These are all very significant flaws. There were some
17 additional flaws that are in my report that maybe are less
18 significant. I am not focusing on those here. I am just
19 telling you about the really big issues that materially change
20 the conclusion from the study, that change the implication from
21 supporting confusion to showing that there is no confusion.

22 Those are the flaws that I'm focusing on.

23 MR. MILLSAPS: Ashley, could we go to the next slide,
24 please.

25 BY MR. MILLSAPS:

1 Q. So, before we get into the flaws, could you just walk us
2 through how Dr. Isaacson's survey design worked here.

3 A. Sure. So I will try not to be too nerdy, but I think it is
4 helpful just to have a reminder of how an *Eveready* survey
5 works. If you remember, that's the name of the survey format
6 that Dr. Isaacson used.

7 It kind of works like this: If you start at the top,
8 you begin by recruiting the right kind of consumers.

9 Dr. Isaacson did this step correctly. He went out and
10 he found likely purchasers in the United States of NFTs, right?
11 People in the market to buy an NFT. No problem there.

12 Then what he did was he randomly assigned people to
13 one of two conditions, a test or a control, just like you might
14 in a drug trial, right? Some people get the drug, some people
15 get a placebo.

16 But in his test condition, people saw the MetaBirkins
17 website, which includes the word "Birkin," "not your mother's
18 Birkin," it includes the word "MetaBirkins," it includes
19 "Hermès" in the little disclaimer at the bottom. And according
20 to the plaintiff, it includes the trade dress, the design of
21 the Birkin handbag.

22 In the control group he took all of those things away.

23 So imagine yourself, you are in one of these two
24 conditions and then you just get asked a series of questions:
25 "Who do you think makes or puts out the items shown on the

1 website?"

2 You write down whatever you think.

3 "Who do you think sponsors approves or authorizes the
4 items?"

5 You write down whatever you think.

6 And then if we bring the next animation up --

7 Q. Actually, before we do that, Dr. Neal, I have one other
8 question.

9 A. Sure.

10 Q. Just at the beginning here, where Dr. Isaacson was sampling
11 likely purchasers of NFTs, were you aware of the criteria that
12 he used to determine if someone was likely to purchase a
13 high-value NFT?

14 A. Yes. I believe it was \$2500 or more.

15 Q. Do you know what he did to verify whether those people
16 actually intended to spend that kind of money on an NFT?

17 A. Not very much. In the survey, what would be normal if
18 you're trying to find a hard-to-reach population, there aren't
19 a lot of people out there who are buying \$2,500 NFTs, so
20 normally what you would do is you would add perhaps some
21 questions to verify that people know what they are talking
22 about, maybe that they've got a crypto wallet, something like
23 that. He didn't do that.

24 MR. MILLSAPS: Ashley, could we go to or just I think
25 advance on this slide.

1 BY MR. MILLSAPS:

2 Q. If you could go on with what you were explaining about
3 this, Dr. Neal.

4 A. Right. So, going back to the test and the control, you've
5 seen the MetaBirkins website or the control, where he's removed
6 those elements that I've mentioned. And you literally just
7 count up the number of people who mention the plaintiff as
8 either making or providing the items or sponsoring, approving,
9 or authorizing them.

10 In his analysis that he presented to you, he said that
11 in his test cell 21.6 percent of people identified the
12 plaintiff. And in the control, it was only 2.9. So what we do
13 is we subtract the control number from the test, and that we
14 call that number the net confusion number. That's 18.7.

15 So, so far what I have done is I have just explained
16 to you what he did and how he reached that conclusion, and now
17 I am going to explain to you what was wrong with that.

18 MR. MILLSAPS: Ashley, if you could go to the next
19 slide.

20 BY MR. MILLSAPS:

21 Q. Dr. Neal, you mentioned this flaw No. 1, a
22 misclassification by Dr. Isaacson of respondents.

23 Could you explain that.

24 A. Yes. So the basic idea is that he counted a whole bunch of
25 people as confused who actually were not confused. And the

1 reason for this is he ignored something called the playback
2 problem. And this is a problem is that arises in particular
3 surveys, not all of them, but it arises any time when the
4 plaintiff and the defendant are using the same name, right?

5 So actually the originally case, the first one ever
6 done back in 1975 faced exactly this problem because it was one
7 company using the name and the other company using the name .

8 What does that mean?

9 It means that if you show people the defendant's
10 product, so here that would be the MetaBirkins website, and you
11 ask who puts this out, people are just going to read back the
12 name if that is on the screen, right? And you don't know from
13 that whether they're really thinking about the plaintiff or
14 they're just reading back the word that you saw on the screen.

15 And I will give you an example to make it a bit more
16 concrete in a minute, but the critical point is there's a
17 solution to the playback problem, and ever since 1975 the
18 solution has been to add this extra question. And
19 interestingly, Dr. Isaacson did include it.

20 So it's question 4 here, right? "What other brands or
21 products do you think are made by whoever makes or provides the
22 items shown on the web page?"

23 So if we move to the next screen, I will show you how
24 this helps us solve that playback problem.

25 Okay. So I just wanted to give you an example of

1 the stimulus, the MetaBirkins website that people saw, right?

2 Just to remind you, that there is a lot of information
3 on it, and there's a lot of brands popping up here, right?

4 So the word "MetaBirkins" appears. The word "Birkins"
5 appears. The word "Hermès" appears in I think three other
6 spots. So do other names, like, "Forbes," "Twitter,"
7 "Preview."

8 Now, the problem is, if you put a stimulus like this
9 in front of a survey respondent and you say, who puts this out?
10 The survey respondent just wants to be helpful, and so they'll
11 start guessing. They will be like, I don't know, Twitter or
12 Forbes. Forbes is written here.

13 So you end up with a lot of answers like that that
14 don't really reflect confusion. It is not really the person
15 thinking, oh, I think Forbes magazine puts out this NFT.
16 They're basically just parroting back, or playing back, the
17 names that are on the screen.

18 So if we can move on to the next slide, I'll show you
19 how we use the data from that extra question to solve this
20 problem.

21 Q. We are about to move on to that slide, Dr. Neal. I just
22 wanted to ask you about the slide we were just looking at.

23 We saw some little red dotted lines.

24 Did you add those to that?

25 A. Yes. Just to show where the marks Hermès, Birkin,

1 MetaBirkin were located on that screen.

2 Q. And sorry, if you could just go back to that?

3 BY MR. MILLSAPS:

4 Q. Dr. Neal, what is this that we are looking at now?

5 A. This is basically the same thing, but from the desktop
6 version of his survey. Some people went through on a smart
7 phone; some people went through on a desktop. They saw the
8 same information, but it just looked a little bit different.

9 MR. MILLSAPS: Okay.

10 Ashley, if we could go to the next slide.

11 BY MR. MILLSAPS:

12 Q. So is there a way to fix this flaw?

13 A. There is. And it dates back to 1975. So I want to explain
14 to you how we used the answer to that extra question that
15 fortunately Dr. Isaacson did include. It's the Q4 one here.
16 But he ignored the data from it.

17 So let's look at example person 1. These are real
18 people from Dr. Isaacson's data. I didn't make up these
19 answers. These are real actual respondents from his survey.

20 So person 1, when they got asked question 1, "Who
21 makes or provides the items shown on the web page?" they said
22 Birkin.

23 Okay. And then at Q4 when they were asked, well,
24 "What other brands or products do you think are made by
25 Birkin?" because they just indicated Birkin, they said, "Birkin

1 makes real bags that are incredibly popular for people to own
2 and carry." Right?

3 So that person is confused. Dr. Isaacson was a
4 hundred percent correct to classify that person as confused,
5 because they said Birkin, and then they successfully identified
6 at least some good put out by Hermès.

7 The same cannot be said of person 2. Person 2 also
8 said Birkins for question 1, but when they were asked, "What
9 other brands or products do you think are made by whoever makes
10 or provides Birkins?" they said Forbes.

11 Now, Forbes is a magazine. Forbes was just one of the
12 other brands that was shown to them on the previous screen. So
13 this person has failed that playback test. They are obviously
14 just trying to be helpful, and they are writing in brand names
15 that they saw on the previous screen. So that person should
16 not have been classified as confused.

17 The critical issue here is that Dr. Isaacson only got
18 to 18.7 percent by totally ignoring all of these Q4 answers,
19 right? So what he did is he classified both of these people as
20 confused.

21 That was a mistake, because he ignored the playback
22 rule, and he ignored this time-honored method that dates back
23 right to the very first survey for dealing with this known
24 problem. And because he misclassified a whole bunch of people,
25 that drove up his confusion number. That's the only way he got

1 it up to 18.7 percent.

2 MR. MILLSAPS: Ashley, if we could go to the next
3 slide.

4 BY MR. MILLSAPS:

5 Q. Did you recode the data in a proper fashion?

6 A. I did. It is a little bit hard to see on this screen, but
7 basically what I did was I went through and found every single
8 person that Dr. Isaacson said was confused. Then I looked at
9 their Q4 responses to see whether they really were confused or
10 not, right? Did they identify Hermès or Birkin and then
11 successfully go on to identify some good put out by Hermès?

12 And the answer is that some do, but a whole bunch
13 don't, right? So all the ones in green are people who
14 successfully passed the playback test. And the ones in red,
15 those are the people he misclassified as confused who actually
16 are not.

17 MR. MILLSAPS: Can we go to the next -- oh.

18 BY MR. MILLSAPS:

19 Q. After accurately coding the data, what was your finding
20 again, Dr. Neal and what is the significance of that?

21 MS. WILCOX: Objection.

22 THE COURT: Well, it is a compound question. Break it
23 down.

24 MR. MILLSAPS: Okay.

25 Yes, I will do that, your Honor.

1 Thank you.

2 BY MR. MILLSAPS:

3 Q. Dr. Isaacson, could you just tell us what the implications
4 of this first flaw were.

5 A. Okay. So the main implication is that when Dr. Isaacson
6 said he got 18.7 percent confusion, he was wrong. He actually
7 got 9.3 percent confusion. That's the first takeaway.

8 Q. And what is the significance of that number, Dr. Neal,
9 again?

10 A. As I said before, the kind of magic number, the minimum
11 threshold that most experts cite to, is 15 percent. So it's
12 only if you get 15 percent or above that you can reach a
13 conclusion that confusion exists.

14 THE COURT: Just so we're clear, that's not a rule
15 that's set by law. It's just set by the convention among
16 people who do these kinds of surveys, yes?

17 THE WITNESS: Yes, sir.

18 That's right.

19 THE COURT: Very good.

20 Go ahead.

21 MR. MILLSAPS: Can we go to the next slide Ashley.

22 BY MR. MILLSAPS:

23 Q. Dr. Neal, you mentioned that there was also a second flaw
24 in the NFT purchaser survey.

25 Could you explain what that flaw is.

1 A. Sure. So Dr. Isaacson's job was to work out if people were
2 confused about who puts out the NFT, right? That's really
3 important. He needed to work out if people were confused about
4 who puts out the NFT.

5 The confusion questions he used don't even make
6 mention of an NFT. Instead, he used vague language that I've
7 got here on the screen. He says, "Who makes or provides the
8 items shown on the web page?" or "Who sponsors approves or
9 authorizes the items shown on the web page?"

10 That might seem like a subtle distinction, you know,
11 NFT versus items, but when you look at the answers that people
12 gave in the survey, it's quite obvious that multiple people
13 were confused by this, and they interpreted it as asking them
14 about who puts out the real-world handbags that are
15 artistically depicted, right?

16 So they didn't interpret it as being asked about who's
17 behind the NFT. They interpreted it as who's behind the
18 real-world handbags that may be artistically depicted in the
19 NFT.

20 And so of course if a person, for example, was aware
21 of Birkin handbags and could see that this was an artistic
22 depiction of a Birkin, they might think, well, this is asking
23 me who puts out the real-world handbag. And that answer would
24 be Hermès. But that's not confusion about the source of the
25 NFT. That's someone accurately saying Hermès puts out the

1 real-world handbag.

2 So this is a real problem for his survey, because his
3 survey had to establish that people were confused specifically
4 about the source of the NFT. And as I said, it's obvious from
5 looking at people's answers that a bunch of people didn't
6 interpret it that way. And that in turn would have inflated
7 the confusion rate even further.

8 Q. Is there a way to correct for this flaw like you were able
9 to correct for flaw number 1?

10 A. Unfortunately, not that I could think of. There's no way
11 to reanalyze the data to fix this. The only thing I can say is
12 that we know that it would have pushed up the confusion rate in
13 an artificial way.

14 MR. MILLSAPS: Ashley, could we go to the next slide.

15 BY MR. MILLSAPS:

16 Q. Actually, before we get to the next slide, Dr. Neal, you
17 mentioned there were some other flaws that you haven't included
18 in the slides here. Is there any other flaw that you found
19 that you would say is consequential in some way here?

20 A. Perhaps one more would be is that, as I understand it, only
21 the word "Birkin" and the trade dress and the word
22 "MetaBirkins" are accused of causing confusion. But
23 Dr. Isaacson's design also included the word "Hermès" in the
24 test, and it missing in the control.

25 Now, what does that mean?

1 It means that he can't isolate the effect of the three
2 elements, Birkin, MetaBirkin, trade dress of the Birkin, he
3 can't isolate the effect of those three things separate from
4 the effect of Hermès.

5 That's a scientific problem, because it means that
6 ultimately he can't tie his 18.7 percent number, which as I've
7 explained is wrong and too high, but he can't tie that number
8 specifically to the three things that the plaintiff alleges is
9 causing confusion.

10 The nerdy technical term is he has a confound in his
11 study design, because Hermès was present in the test and it was
12 missing in the control.

13 Q. So, just very briefly, Dr. Neal, how would you summarize
14 your conclusions about Dr. Isaacson's NFT purchaser survey?

15 A. So the main conclusion really is that the survey does not
16 show 18.7 percent confusion. It shows under 10 percent
17 confusion.

18 That, in the parlance of survey experts working in
19 these kinds of surveys, means there is no confusion. Confusion
20 doesn't have to be zero. I don't think I have ever run a
21 survey that's found zero confusion. But as long as the number
22 is below 15, that's the most typical threshold number, the
23 proper conclusion is the survey shows there is no material
24 confusion at all.

25 MR. MILLSAPS: Ashley, could we go to the next slide.

1 Thank you.

2 BY MR. MILLSAPS:

3 Q. Dr. Isaacson, you mentioned -- or, Dr. Neal, you mentioned
4 Dr. Isaacson's handbag purchaser survey.

5 Could you just, again, explain what you did to analyze
6 the results of that survey.

7 A. Certainly. So, as I mentioned, Dr. Isaacson ran this
8 survey, but he didn't properly write up the results in his
9 report. He did have all the information there hidden in kind
10 of exhibits, and I could go in and calculate the confusion
11 number from this second survey, right?

12 Just as a reminder, this is the survey of the people
13 spending \$10,000 or more on handbags, right? So that would
14 include likely customers of Hermès goods.

15 The design was basically the same as the first survey.
16 What he found, there was a confusion level of 3.6 percent. So
17 incredibly low, way below that 15 percent threshold.

18 What do we take away from this? This very clearly
19 shows that Hermès customers are not at all likely to be
20 confused and think that Hermès is behind Mr. Rothschild's
21 MetaBirkins NFT.

22 Q. Dr. Neal, in your opinion, was it proper for Dr. Isaacson
23 to ignore the results of his survey in reporting his opinions
24 about confusion over MetaBirkins?

25 A. No, it wasn't, because the proper scientific method means

1 if you design two studies, you had a good reason to design two
2 studies, and you present the results from the two studies
3 regardless of whether they help you or hurt you. That's the
4 neutral scientific way of doing things.

5 And I didn't find Dr. Isaacson's explanation for, you
6 know, running the study, getting, frankly, a bad result for
7 Hermès and then claiming the study was irrelevant, I did not
8 find that scientifically sound reasoning.

9 Q. Thank you, Dr. Neal. I just have a few more questions. We
10 have just gone through a lot of information. In closing I
11 would just like to ask you a hypothetical.

12 Let's say that Dr. Isaacson's survey was flawless,
13 there were no flaws, and you agreed with his 18.7 percent
14 conclusion. How would you characterize a finding of 18.7
15 percent confusion?

16 A. If it was a properly designed study, which you know I
17 believe this is not, a finding of 18.7 would suggest some level
18 of confusion, but it's barely above the minimum level. It's
19 less than 4 percentage points above the minimum.

20 Q. Have you found in your own confusion surveys results higher
21 than 18.7 percent?

22 A. Yes, many times.

23 Q. Have you found results higher than 25 percent?

24 A. Yes, many times.

25 Q. Have you found results higher than 35 percent confusion?

1 A. Yes, I have.

2 Q. So would it be accurate to describe Dr. Isaacson's
3 purported finding of 18.7 percent confusion as meaning that
4 there's substantial likelihood of confusion?

5 THE COURT: Sustained.

6 MS. WILCOX: Thank you, your Honor.

7 BY MR. MILLSAPS:

8 Q. Dr. Neal, my last question: Do you consider 18.7 percent
9 confusion to be a substantial likelihood of confusion?

10 A. No, I do not. I would characterize it as barely above the
11 minimum.

12 MR. MILLSAPS: Thank you.

13 No further questions, your Honor.

14 THE COURT: Just so that I am clear, so the people who
15 run these kind of surveys, as I understand your testimony, have
16 decided among themselves that the cutoff point is 15 percent,
17 right?

18 THE WITNESS: Well, I would probably characterize it
19 as partly driven by the experts and partly driven by courts,
20 because, of course, courts have accepted different numbers.

21 THE COURT: Courts have accepted different numbers,
22 and the question of what the courts have decided is entirely
23 for the Court, not for a witness.

24 THE WITNESS: Yes. That's my understanding.

25 THE COURT: So, going back to what is in your domain,

1 what the experts have chosen, so if the cutoff is 15 percent,
2 and you think that, well, even though this -- if the study had
3 been done properly that would have been above the cutoff, but
4 you say it's not really as good as a higher figure, then why
5 doesn't that cut the other way? If it's 9 percent, as you
6 calculate, while that's below the cutoff, it is still some
7 confusion, not no confusion. True?

8 THE WITNESS: Well, my understanding is that courts
9 and experts have taken the position that every survey has some
10 noise in it. And so you are unlikely to get zero purely
11 because of noise. So a 9 percent figure actually could
12 effectively be zero because it's so small it could just be the
13 product of noise.

14 THE COURT: But in this case, you very helpfully
15 undertook to look at the actual responses so the impact of
16 noise was minimized under your analysis because you got more
17 deeply into the data. Yes?

18 THE WITNESS: That's fair to say.

19 THE COURT: Okay.

20 Go ahead, counsel.

21 CROSS-EXAMINATION

22 BY MS. WILCOX:

23 Q. Good morning, Dr. Neal.

24 A. Nice to see you again.

25 Q. Nice to see you. I last saw you on Zoom a world away.

1 A. Yes.

2 Q. So, to be clear, you did not conduct any survey in this
3 case?

4 A. That's correct. I did not.

5 Q. But you have conducted surveys in the past for others who
6 were sued for trademark infringement?

7 A. I have. There wasn't the budget here to do it. It is my
8 understanding Mr. Rothschild couldn't afford it. Otherwise
9 perhaps I would have.

10 MS. WILCOX: Move to strike, your Honor.

11 THE COURT: Sustained.

12 BY MS. WILCOX:

13 Q. You were retained on August 4, 2022, by the Lex Lumina law
14 firm, represented here by Rhett Millsaps and Chris Sprigman.

15 A. I think that's correct.

16 Q. You issued your rebuttal report seven days later, and you
17 agreed in advance that that would cost \$21,000 no matter what
18 you did with it?

19 A. I wouldn't characterize it quite like that. I think that's
20 the estimate I provided, and that is indeed what I billed.

21 Q. And were you paid for that?

22 A. Yes.

23 Q. Then you billed another \$9,000 to Lex Lumina?

24 A. For the deposition, correct.

25 Q. Were you paid for that?

1 A. Yes, I was.

2 Q. What about Mr. Rothschild's other law firm, Paris St.
3 Laurent & Wechsler? Have you sent any bills to them?

4 A. No, I have not.

5 Q. When you are testifying like here today at trial, what are
6 you being paid?

7 A. Well, my day rate is normally \$4,000 for a trial, but if I
8 am on the stand for not a long period of time, I sometimes
9 charge less.

10 Q. What are you charging now?

11 A. It depends.

12 THE COURT: I think what he's indicated is it depends
13 on how long your cross-examination is.

14 A. If you could drag it out as long as possible, that would be
15 great.

16 Q. I would love to, but we won't in the interest of time.

17 So you testified there are not a lot of people who are
18 buying high-end NFTs. Did I hear you correctly?

19 A. I indicated that it is a difficult sample to recruit for
20 compared to what you commonly do in trademark surveys, you
21 know, where it might be people who buy detergents or people
22 buying a car.

23 Q. Have you ever attempted your own survey of NFT purchasers?

24 A. I have not.

25 Q. And --

1 A. Actually, let me correct that.

2 Q. Okay.

3 A. Sorry. Without disclosing any confidential engagements, I
4 have embarked on some research projects along that line.

5 Q. Have you looked at the range of prices that NFT purchasers
6 paid in this case for MetaBirkins NFTs?

7 A. I have certainly looked at the NFT website. I don't
8 remember analyzing the price range.

9 Q. So you are not aware that the original minters who
10 purchased the first MetaBirkins NFTs paid around \$450 for each?

11 A. No, I didn't know that.

12 Q. And that was in the cryptocurrency Ethereum. Are you
13 familiar with that?

14 A. I am familiar with that.

15 Q. And that cryptocurrency has varied and fluctuated widely in
16 what it translates into in U.S. dollars?

17 A. I am aware of that.

18 Q. You agree that Dr. Isaacson chose the proper survey format
19 in this case, correct?

20 A. He chose the proper survey format, but he didn't implement
21 it properly.

22 Q. I only asked you if he chose it. Could you please answer
23 the question.

24 THE COURT: No, he answered the question fairly.

25 Go ahead. Put another question.

BY MS. WILCOX:

Q. You claim if someone asks a question in the very first question, for example, No. 1, and it demonstrates they were confused that you are going to start subtracting that respondent as being counted as confused if you determine later in other questions that you don't like their answers?

MR. MILLSAPS: Objection.

A. No --

THE COURT: I think the question is somewhat confusing.

MS. WILCOX: We don't want that.

THE COURT: Put a new question.

BY MS. WILCOX:

Q. So let's go back. In fact, this might be more helpful.

The respondents were looking at the metabirkins.com web page when they were looking at the test, not the control, but the test.

Is that your understanding?

A. Correct.

Q. And then they were asked a series of questions about who they thought would be responsible for putting out the items shown, is that correct?

A. Yes.

Q. And whether they thought the items might be sponsored or approved by someone as well?

1 A. Correct.

2 Q. And so you decided to look at the verbatims, as they're
3 called, the actual words each person said in response to each
4 question, is that right?

5 A. Yes.

6 Q. And then you applied your own judgment as to whether or not
7 you thought they were confused?

8 A. No, ma'am.

9 Q. Who did the analysis then?

10 A. I did the analysis. But it was not my own judgment. I
11 applied the exact coding scheme developed in the survey in
12 1975, as clearly documented, and then I believe upheld at the
13 appeals level, which clearly describes the coding method to
14 address this problem of both parties using the same name. So
15 the coding method I used is identical to what is described in
16 the original survey. It was Dr. Isaacson who invented his own
17 method that deviated from that.

18 Q. Well, Dr. Neal, you're testifying that the survey was the
19 appropriate format and it was set up in 1975. Is that when the
20 case --

21 MR. MILLSAPS: Objection. Compound.

22 THE COURT: Well, that's right, but I think she was
23 just trying to move things along.

24 I will allow it. I will break it down.

25 The survey was the appropriate format, yes?

1 THE WITNESS: Yes. Provided it was coded accurately.

2 THE COURT: It was set up in 1975?

3 THE WITNESS: I believe so.

4 THE COURT: Go ahead, counsel.

5 BY MS. WILCOX:

6 Q. Are you aware of any more recent court opinions that follow
7 your view of subtracting respondents?

8 THE COURT: Sustained.

9 BY MS. WILCOX:

10 Q. Are you aware of any more recent court opinions that
11 support the approach you are advocating in this case?

12 A. As -- well, I am not a lawyer, so I don't track court cases
13 per se. What I cited in my report was the most up-to-date
14 scholarly treatise by Jerre Swann, published in 2022, in a book
15 coauthored by Professor Shari Diamond who wrote the Federal
16 Judicial Center's Reference Guide on Survey Research. And
17 Mr. Swan reiterates the necessity of using this coding scheme
18 as enshrined in the original in circumstances like this.

19 (Continued on next page)

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1 BY MS. WILCOX:

2 Q. Well, in fact, since you're paraphrasing, let's look at the
3 actual words of Mr. Swann.

4 MS. WILCOX: Mr. Ferrer, could you please pull up Neal
5 Deposition Exhibit 140, and it's page 000145.

6 Q. Dr. Neal, is this the paragraph of the treatise that you
7 were mentioning? If we go to the middle, there are relatively
8 minor wrinkles.

9 A. Yes, that's it.

10 Q. In this case, Jerre Swann is discussing that it was likely
11 necessary in Eveready to differentiate between respondents who
12 were merely pulling back the Eveready label on the lamp from
13 those who believe the lamp was put up by the battery company.
14 He uses the words "likely necessary"; correct?

15 A. He does.

16 Q. He doesn't say "absolutely necessary"?

17 A. Well, he says "likely necessary." It also was the basis of
18 the decision in the *Eveready* case, that is how the data were
19 coded. It's also just plain logic, right, that if you -- and
20 we saw that in the data that I put up. Some people clearly are
21 engaging in this practice of just trying to be helpful --

22 THE COURT: Well, I think you've answered the
23 question.

24 MS. WILCOX: Thank you, your Honor.

25 THE COURT: Put another question.

1 Q. And in that *Eveready* case, there was no control group that
2 was meant to help eliminate noise; is that correct?

3 A. That is correct.

4 Q. And since that time in 1975, the trademark survey community
5 of experts has been following the practice of adding a control
6 group; is that correct?

7 A. Yes, but it doesn't involve this problem.

8 Q. That's your opinion.

9 But among your peers, we know Dr. Isaacson disagrees
10 with you. There is at least one other person, right, who
11 doesn't agree with your interpretation of the *Eveready* format
12 as requiring eliminating this playback; isn't that right?

13 A. Well, I'm sure there are experts that have a variety of
14 opinions. My opinion is anchored in the documented coding of
15 the original *Eveready*, and reaffirmed right here by Jerre Swann
16 in 2022.

17 Q. Now, in the *Eveready* case, wasn't it true that the
18 plaintiff had the trademark *Eveready* and the defendant had the
19 trademark *Ever-Ready*, just spelled with a hyphen between the
20 term, right?

21 A. That's correct.

22 Q. So those words sound absolutely identical; is that right?

23 A. Yes, I believe that's right.

24 Q. So if a respondent answered, I believe *Eveready* puts this
25 out, you wouldn't necessarily know which *Eveready* they were

1 contemplating in answering that question?

2 A. Correct.

3 Q. And in this case, I know you understand that the Birkin
4 trademark that is owned by Hermès the key word mark at issue,
5 Birkin versus MetaBirkins; is that correct?

6 A. Yes, that's my understanding.

7 Q. And Birkin versus the slogan "Not Your Mother's Birkin";
8 correct?

9 A. Correct.

10 Q. Do those words sound absolutely identical to you, like
11 Eveready and Ever-Ready?

12 A. I think they don't, but I think that's missing the point
13 that I was trying to make.

14 Q. Well, thank you for answering my question.

15 You didn't discuss this particular case with Jerre
16 Swann, did you?

17 A. I don't believe so. I have discussed this issue with him
18 previously, but I don't -- no, I did not discuss --

19 Q. He's not here to testify today about his comments about
20 whether this was only likely necessary and Eveready versus your
21 interpretation that it's required?

22 THE COURT: Sustained.

23 Q. When you went and reviewed the actual responses from the
24 interviewees to determine what you thought they were thinking,
25 did you go back to the original interviewees and ask them?

1 A. No, I think that would be logistically impossible. And it
2 also wasn't necessary because, as I said, the data was there,
3 it had just been ignored by Dr. Isaacson.

4 Q. That data is something that you looked at by yourself or
5 did you have anyone assist you?

6 A. Both. I looked at it myself and I believe I had a research
7 assistant look at it with me.

8 Q. So it wasn't clear enough for one person to determine what
9 the interpretations of those responses should be?

10 MR. MILLSAPS: Objection.

11 THE COURT: Sustained.

12 Q. Dr. Neal, you would agree that this is what's called a
13 forward confusion case?

14 A. I believe that's what's alleged, yes.

15 Q. And in a forward confusion case, you survey the junior
16 user's consumers; correct?

17 A. Correct.

18 Q. And in this case the junior user is Mr. Rothschild?

19 A. Or his product is.

20 Q. Sorry?

21 A. His product, his MetaBirkins website.

22 Q. Yes. And so the products said that MetaBirkins that are
23 sold through NFTs?

24 A. That's my understanding, yes.

25 Q. To buyers of NFTs?

1 A. Correct.

2 Q. So NFT buyers are the relevant population to survey?

3 A. For forward confusion, that's correct.

4 Q. Have you ever conducted a survey where the criteria for
5 participating required the interviewee to be in the market for
6 something that cost more than \$10,000?

7 A. Yes.

8 Q. And when you are looking for those interviewees, is there
9 any kind of priming that happens, because you're already
10 looking for someone who might be in a smaller pool because
11 they're willing to spend something like \$10,000 on an item?

12 MR. MILLSAPS: Objection.

13 THE COURT: Well, I'm a little unclear what's meant by
14 any kind of priming. Why don't you rephrase the question.

15 Q. Dr. Neal, I learned a little bit about priming from reading
16 some of your background materials. Could you tell us what
17 "priming" means?

18 A. Sure. So priming would be -- in this kind of context it
19 would be typically some kind of improper raising of awareness
20 or salience of a particular idea in a way that it might
21 influence you later on.

22 So, for instance, if I said, Doctor, doctor, doctor, a
23 couple of minutes later other concepts like hospital and nurse
24 might be a little bit more accessible in your thinking. That's
25 priming.

1 Q. And so when you are looking for people to respond to the
2 survey and you set a criteria, and it's in the industry like in
3 our case it was involving handbags; correct?

4 A. Yes.

5 Q. So there are only, let's say, a rarefied number of
6 companies that even make \$10,000 and above handbags, would you
7 agree?

8 A. I haven't studied it, but that sounds reasonable.

9 MS. WILCOX: Could we please, Mr. Ferrer, pull up the
10 Exhibit 193, which is in evidence. I believe it's slide 21.

11 Q. And you testified that you looked at Dr. Isaacson's survey
12 results from interviewing handbag purchasers. And you found a
13 net confusion level of 3.6 percent; is that correct?

14 A. Correct.

15 Q. But the actual test web page showed 18.8 percent of the
16 people looking at the metabirkins.com page were confused;
17 correct?

18 A. Correct. But that number is meaningless.

19 Q. Well, the number with the control web page shows 15.2
20 percent of the respondents were confused. And because that
21 confusion was so high when the expensive handbag survey takers
22 looked at a control page that had no reference to Birkin or the
23 Birkin bag or the Hermès and the disclaimer, it still thought
24 it was Hermès or Birkin; correct?

25 MR. MILLSAPS: Objection.

1 THE COURT: Sustained.

2 Q. This survey that Dr. Isaacson conducted indicated that 15.2
3 percent of the respondents who saw the control page indicated
4 confusion; correct?

5 A. That's correct.

6 Q. Thank you.

7 Now, this case is about NFTs. And I'm sure we have
8 all learned a lot, if I'm only just speaking for myself.

9 What is your definition of an NFT?

10 A. Well, I'm obviously not a technical expert, but it stands
11 for non-fungible token. I understand that it is to be some
12 kind of digital token that is secured by blockchain technology
13 traceable. It's got a lineage as it moves from person to
14 person, can be tracked. And it can have other digital objects
15 attached to it like an artwork, but that's my nonexpert
16 definition.

17 Q. So it's like a deed we've been discussing during this case;
18 is that right?

19 A. I wouldn't have the technical knowledge to say that.

20 Q. Or you would agree that it could be called a digital token?

21 MR. MILLSAPS: Objection.

22 THE COURT: I'm not sure why these questions are being
23 put to this witness. But I will remind the jury that in this
24 case, the NFTs were the equivalent of a certificate of
25 ownership of the underlying digital images subject to the smart

1 contract; and that we have allowed other witnesses to speak of
2 MetaBirkin NFTs as including both the certificate, if you will,
3 and the underlying images.

4 Go ahead, counsel.

5 MS. WILCOX: Yes. Thank you, your Honor.

6 Q. The reason that you criticize Dr. Isaacson for saying, Who
7 do you think makes the items shown on this web page, is because
8 he should have used the word "NFT"; correct?

9 A. I think that would be a better term that he could have
10 used.

11 Q. And when you issued your expert report on September 1,
12 2022, you did not identify any word to replace items in that
13 report?

14 A. I did in my deposition, but not in the report.

15 Q. In fact --

16 THE COURT: So if I understand though what you're
17 getting at, you think it should have used the word "images"
18 rather than "items"?

19 THE WITNESS: No, I think he should have used the word
20 "NFT," since that's the accused --

21 THE COURT: Yes, but that doesn't -- as you, yourself
22 just indicated, you're not an expert on NFTs; so presumably
23 most people taking the survey would not be an expert on NFTs.

24 But I thought your point -- maybe I missed it -- was
25 that by using the term "items," he made the people taking the

1 survey think, Oh, these bags are actually produced; whereas if
2 he had used a term like "images" or "digital images," who
3 produces these images, then that would have been clear. Isn't
4 that the point you were making?

5 THE WITNESS: Yes. Anything that gets -- any language
6 that gets away from what actually happened in the data, which
7 is some people thinking, Oh, I'm being asked who put out the
8 real-world physical handbag that might be artistically depicted
9 here. So any language -- yours might be better, but any
10 language that got away from that wrong interpretation that his
11 survey respondents clearly had some of them.

12 THE COURT: All right. Go ahead.

13 BY MS. WILCOX:

14 Q. And on the metabirkins.com web page, you can't find the
15 actual NFT tokens or deeds that we have identified?

16 MR. MILLSAPS: Objection.

17 THE COURT: Sustained.

18 Q. And today your testimony is that he should have used the
19 word "NFT" in this survey, Dr. Isaacson's survey? Just
20 asking --

21 MR. MILLSAPS: Objection.

22 Q. I'm sorry. I want to be clear that the question I'm
23 asking, is your testimony today that the word "items" should
24 have been replaced by "NFT"?

25 A. My testimony is that "items" was bad. It's true that I

1 don't have the technical expertise to propose perhaps the best
2 alternative, so my testimony really is that the word "items"
3 was bad.

4 Q. Dr. Neal, you agree, do you not, that a survey stimulus
5 must replicate the market conditions a purchaser would
6 encounter?

7 A. Yes, I do.

8 Q. And that the closer the survey methods mirror the situation
9 in which the ordinary person would encounter the trademark, the
10 greater the evidentiary weight of the survey results?

11 A. As a general rule, I agree with that.

12 Q. And Dr. Isaacson tested the metabirkins.com web page to
13 determine whether it caused confusion as either coming from
14 Hermès or Birkin or sponsored, authorized or approved by Hermès
15 or Birkin, is that a fair summary?

16 A. No, because of the mistakes that he made in executing that.

17 Q. Well, he was testing a web page with all of its elements of
18 the Birkin name and trade dress and Hermès in the disclaimer;
19 is that right?

20 A. Yes, that's right.

21 Q. And the, I think you used the term today, "artistic images"
22 that are on the metabirkins.com site, those are not photographs
23 of the Hermès Birkin bag, right?

24 A. That's my understanding. I don't really technically know
25 how they're created, but that's my understanding.

1 Q. So those are not real Birkin bags that are in those images?

2 A. Again, I'm not a technical expert, but that is my
3 understanding.

4 Q. I have no further questions. Thank you very much.

5 THE COURT: Redirect.

6 REDIRECT EXAMINATION

7 BY MR. MILLSAPS:

8 Q. Dr. Neal, you got cut off a lot when you were trying to
9 explain some of your answers; so I just want to go back to
10 those points so that you can give your explanations.

11 Ms. Wilcox, do you recall that she asked you about how
12 after the Eveready survey, control groups were added? And you
13 began to say that that doesn't solve the playback problem, when
14 you were cut off. Could you go on and explain what you were
15 going to explain there.

16 THE COURT: Just so the jury is not under a
17 misunderstanding, he was cut off because he had already
18 answered the question. It wasn't that counsel for plaintiffs
19 was wrongly cutting him off. But that doesn't mean that you
20 can't inquire further, so go ahead.

21 MR. MILLSAPS: Thank you, your Honor.

22 Q. Could you explain why adding a control group doesn't solve
23 the playback problem?

24 A. Sure. So it is true that the surveys have got better as
25 time has gone on. And so the very first Eveready survey that

1 was done didn't have a separate control group. And Dr.
2 Isaacson's does, as every single Eveready survey that now any
3 expert would do.

4 The issue is having a control group doesn't solve this
5 reading back problem, because the control group didn't include
6 the words "Hermès" or "Birkin" or "MetaBirkins." And so you
7 still have the problem that in the tests where people see
8 MetaBirkins, Birkin, Hermès, some of the people who see that
9 probably have never heard of Hermès before in their lives. And
10 someone asks them who puts this out, and they're like, I don't
11 know, Hermès. That's not confusion. That's guessing. That's
12 parroting back what's on the screen. And that's why you have
13 to have that follow-up question. It's why Eveready had it back
14 in 1975. And the control group doesn't in any way address that
15 problem. Control groups are good, but they don't solve that
16 particular problem.

17 Q. Dr. Neal, do you recall that Ms. Wilcox showed you a
18 chapter --

19 THE COURT: Plaintiffs feel compelled to object to the
20 notion that there's anyone in the universe who hasn't heard of
21 Hermès.

22 MS. WILCOX: Thank you, your Honor. I thought that
23 was maybe a joke.

24 Q. Dr. Neal, do you recall that Ms. Wilcox showed you a
25 paragraph from a chapter of Jerre Swann's book talking about

1 this playback or reading back problem?

2 A. Yes.

3 Q. And do you know Jerre Swann personally who wrote that book?

4 A. I do.

5 Q. And have you discussed this issue with Jerre Swann before?

6 A. Yes, I have.

7 Q. Do you recall that Ms. Wilcox also pointed out to you that
8 in *Eveready*, the names were identical between the two marks,
9 *Eveready*; and then asked you about this case where the test
10 stimulus showed *MetaBirkins*, as well as *Birkin* and *Hermès*; do
11 you recall those questions?

12 A. Yes.

13 Q. And you responded: I think that's missing the point I was
14 trying to make. Do you recall that?

15 A. Yes.

16 Q. Could you explain what you meant by that?

17 A. Sure. So the issue with playback is simply whether the
18 respondent is saying a list of brands. And it doesn't matter
19 if the brands are embedded in a slogan like "Not Your Mother's
20 *Birkin*," people are still going to see the word "*Birkin*" or
21 "*MetaBirkin*," they are going to see "*Birkin*" inside
22 "*MetaBirkin*."

23 And because of the playback problem, that means that
24 even if it's embedded in a slogan, some people, when they come
25 to guess and they are trying to be helpful and answer the

1 survey questions, they are going to shrug their shoulders and
2 they're going to say Birkin.

3 And so it doesn't matter whether the identical term
4 being used by the plaintiff and the defendant is literally
5 identical or it's -- it wasn't literally identical in the
6 *Eveready* case, by the way. It doesn't matter if it's embedded
7 in a slogan, it's still going to trigger some participants to
8 just parrot back. And we need to find who those people are
9 because they don't count as confused.

10 Q. Thank you.

11 And do you recall that Ms. Wilcox asked you whether
12 you had a research assistant look at Dr. Isaacson's coding data
13 as well?

14 A. Yes.

15 Q. And why did you have a research assistant also look at the
16 data that you were analyzing?

17 A. It's standard safety conservative protocols; just to make
18 sure that, you know, I didn't miss something or that she didn't
19 miss something. So we normally code things independently. We
20 come together and we compare our coding. And normally we coded
21 everything exactly the same, but occasionally something might
22 be different and then we discuss it. I think in this instance
23 we coded everything identically.

24 Q. And do you recall that Ms. Wilcox was asking you questions
25 about who was the relevant population to survey for this case,

1 whether it was NFT buyers or handbag purchasers?

2 A. Yes.

3 Q. And if you had been hired by Hermès to conduct the surveys
4 that Dr. Isaacson conducted, would you have known the answer to
5 that question before you conducted the surveys?

6 A. Yes. That's one of the things that's strange here. If
7 forward confusion is being alleged, then you would normally
8 only run a forward confusion survey. I understood that perhaps
9 the second survey was relevant to whether Hermès wanted to
10 branch out into NFTs.

11 Q. And so if the plaintiffs said, Well, the handbag purchaser
12 survey was irrelevant for this reason or that reason, would
13 they have known that before the survey was conducted in the
14 first place?

15 A. Yes, absolutely.

16 When you start a project like this, you discuss with
17 the law firm, you know, what is the scope of the allegation.
18 And then you align on a survey, maybe you do more than one
19 survey. But I've never been in a position where you and the
20 lawyers say, We need to do these two surveys. Let's go and do
21 them. Oh, this one produced really bad results. Actually,
22 that survey is irrelevant.

23 MS. WILCOX: I'm going to object, your Honor.

24 THE COURT: Well, the question as posed was answered
25 in the first two words, which was "Yes, absolutely." So the

rest of the answer will be stricken.

MR. MILLSAPS: And how would you have known -- sorry, could I get the question -- the last question read back so I can remember --

THE COURT: The question was: If the plaintiffs said, Well, the handbag purchaser survey was irrelevant, would they have known that before the survey was conducted in the first place? And his answer was yes.

Q. And how would they have known that, Dr. Neal?

A. Well --

MS. WILCOX: Objection.

THE COURT: No, I'll allow it.

A. How would they have known that it was irrelevant before conducting it? Well, because the law firms know what claims they're bringing; they know what kind of confusion they are alleging. And they design a survey to test whatever the alleged confusion is. So that's why that's an unusual set of circumstances.

MR. MILLSAPS: And I just have one more question, but I need to show Dr. Isaacson slide 21, the one that Ms. Wilcox was showing him. I'd ask, Ms. Wilcox, would you be able to put up Dr. Isaacson's slide 21 for us? Thank you very much.

Q. Dr. Neal, do you recall that Ms. Wilcox was asking you about the numbers in the test web page and the control web page columns here for the handbag survey?

1 A. Yes.

2 Q. And what do those numbers mean?

3 A. So in any experiment, the numbers you get in the test, in
4 the control by themselves really don't mean very much at all.
5 So the 18.8 percent that Dr. Isaacson got on a test page and
6 the 15.2 percent that he got on a control web page, they don't
7 really mean very much, except possibly the fact that if you're
8 speaking to people who know handbags, who know expensive
9 handbags, a bunch of them are going to say Hermès to anything.

10 What matters is the net.

11 The net is the difference in confusion when the
12 specific things that the plaintiff is alleging to cause
13 confusion are present, that's the test, versus when they are
14 absent in the control.

15 So the net, that 3.6 number, that tells us how much
16 extra confusion is coming from the name Birkin, the
17 MetaBirkins, and the shape, the design of the Birkin handbag.
18 So that is a tiny number, 3.6. This study shows that those
19 three alleged causes of confusion are actually not causing any
20 confusion whatsoever, very close to zero. And that is amongst
21 Hermès' own likely buyers.

22 Q. Thank you. No further questions.

23 THE COURT: Any recross?

24 MS. WILCOX: No, your Honor.

25 THE COURT: Thank you very much.

1 You may step down.

2 (Witness excused)

3 THE COURT: Okay. So, ladies and gentlemen, we're
4 going to give you a ten-minute break now, and then we're going
5 to hear the closing arguments of counsel. Each of the counsel
6 has asked for an hour, so that will take us right up to our
7 lunch break at 1 o'clock. Then we'll have our lunch, and then
8 I'll give you my instructions of law, which will take about a
9 half hour. And then the case is yours.

10 So take a ten-minute break.

11 (Jury not present)

12 THE COURT: So I will note for the record that it is
13 generally agreed that one of the greatest novels ever written
14 was *Swann's Way*. But the record will reflect that that was not
15 written by Jerre Swann.

16 Let me have my law clerk pass to counsel the final
17 charge. And you're free -- either counsel is free to refer to
18 it during closing argument.

19 I had forgotten this morning, really we ran out of
20 time. Was there any objection to the verdict form?

21 MS. WILCOX: Your Honor, there was a little bit of
22 cleanup under the trademark infringement *Polaroid* factors that
23 we wanted to bring to your attention.

24 THE COURT: No, no, no, I'm asking about the verdict
25 form.

1 MS. WILCOX: Oh, the verdict form.

2 With your Honor's change in the First Amendment, we
3 had a question about whether we were going to ask for the
4 dilution and cybersquatting claims to be broken out
5 individually under the First Amendment analysis, but I do not
6 believe that is needed any longer.

7 THE COURT: No, given that we've now reduced it to the
8 question of intent, I don't think it matters. So I take it you
9 are otherwise satisfied with the verdict form.

10 MS. WILCOX: Yes, thank you.

11 THE COURT: All right.

12 MR. HARRIS: We have no objection, your Honor.

13 THE COURT: All right.

14 So I'll give you folks -- I'm sorry, yes.

15 MR. HARRIS: Your Honor, I don't know if you're going
16 to get off the bench. I have one issue.

17 THE COURT: That's what I was planning to do, but if
18 you'd rather have the pleasure of my company, I'm at your
19 disposal.

20 MR. HARRIS: I would, your Honor.

21 Your Honor, when we made an agreement with plaintiffs'
22 counsel not to call Mr. Loo to save time, there were two
23 documents that we had intended to put in through Mr. Loo. I do
24 not believe they are controversial documents. One is a press
25 release that Mr. Loo put out regarding MetaBirkins, and the

1 other is a correction to a reporter.

2 And I had understood that these documents would be
3 stipulated in. And Mr. Warshavsky last night told me that they
4 would not be stipulated in.

5 And, A, I would ask that they be stipulated in; and,
6 B, if they are not stipulated in, I would certainly ask that
7 Mr. Warshavsky not say anything contrary to these documents.

8 MR. WARSHAVSKY: I'm not sure I agree with the --

9 THE COURT: No party is required to stipulate to
10 anything. So if you're not stipulating to them, they are not
11 in. But what about the question about --

12 MR. WARSHAVSKY: I wasn't intending to discuss the
13 documents.

14 THE COURT: Okay. Good.

15 MR. HARRIS: Thank you, your Honor.

16 THE COURT: That reminds me, there was this one
17 question about how much of one exhibit was in or out, has that
18 been resolved?

19 MR. HARRIS: Your Honor, the exhibit is in. The only
20 issue is the pages. It was a very long document.

21 THE COURT: Right.

22 MR. HARRIS: It was going to be -- I can meet with
23 Mr. Warshavsky at the break.

24 THE COURT: You'll have the lunch break to work this
25 all out, but I want to be able right after my charge to send

1 the exhibits and the index to the jury. So just make sure it's
2 done before then.

3 MR. HARRIS: Thank you, your Honor.

4 THE COURT: Okay. Very good.

5 We'll take five more minutes.

6 (Recess)

7 THE DEPUTY CLERK: Shall I bring in the jury?

8 THE COURT: Please.

9 (Jury present)

10 THE COURT: Ladies and gentlemen, we're about to hear
11 closing arguments from counsel. I want to remind you, as I did
12 before opening statements, that nothing that counsel says is
13 itself evidence. The evidence, which is now totally before
14 you, came from the witnesses and the exhibits and there are a
15 few stipulations, and those are the only sources of evidence.

16 But now that the evidence is fully completed, it may
17 be helpful for you to hear from counsel as to what they think
18 the evidence shows or fails to show, as the case may be. And
19 that's why we have closing arguments, to help you with your own
20 deliberations.

21 So we'll begin with plaintiffs' counsel.

22 MR. WARSHAVSKY: Thank you, your Honor.

23 Good morning. The end is in sight. And thank you
24 all. I know I speak for everybody by thanking you. This is an
25 important case for both sides and very much appreciate your

1 consideration.

2 This case has proceeded a little bit oddly in that
3 it's kind of felt at times like we're almost trying two
4 different cases. And so I thought I'd almost level set for a
5 little bit. And I want to go back to where I started a week
6 ago when I was giving my opening statement.

7 And what I told you was that there are two main
8 reasons that Hermès brought this lawsuit. First, Hermès
9 believed that consumers were going to be confused by the
10 MetaBirkins NFTs; and second, Hermès believed that the
11 MetaBirkins NFTs damaged their Birkin brand.

12 Mr. Rothschild's counsel, Mr. Millsaps, then got up
13 and talked about Mr. Rothschild's right as an artist. And he
14 then said that this case was about a multibillion-dollar
15 corporation trying to punish Mr. Rothschild because they don't
16 like his art, and because they are scared of what it might show
17 about the luxury consumer culture.

18 I submit you didn't see any evidence of that
19 throughout this trial. Hermès took no position about
20 Mr. Rothschild's art; certainly took no position about any
21 commentary. I'm not sure we heard about any commentary. And
22 Hermès is certainly not here to punish Mr. Rothschild. And
23 I'll get to that a little bit later.

24 The evidence actually showed just the opposite, right.
25 Nicholas Martin got up and testified. And his testimony was

1 that Hermès has not brought a claim like this – just a
2 trademark infringement claim, straight trademark infringement
3 claim – in over 20 years. He then said it never sued an
4 artist, it never even sent a cease and desist to an artist.
5 And that was even true for Mr. Rothschild's Baby Birkin
6 project, right.

7 So why was this case different?

8 And that's a theme I'm going to come back to in a
9 moment.

10 But let's talk for a minute about what a trademark
11 infringement case is really about. And as Judge Rakoff said,
12 he's going to provide you with the instructions. But
13 generally, trademark infringement is about consumer confusion.
14 The central question is whether a potential consumer, when he
15 or she sees the MetaBirkins NFTs, is likely to be confused that
16 they somehow are connected to or sponsored by Hermès.

17 Hermès's second claim, the damage -- where it's been
18 damaged is what's called dilution. And that looks to whether
19 the MetaBirkins NFTs somehow does damage to Hermès's Birkin
20 trademark. I'm going to explain those both a little bit more
21 later.

22 But let's get back to the central question again: Why
23 did Hermès bring this claim?

24 Now, Nicholas Martin went through those reasons.

25 First, there were 100 NFTs. They looked similar to

1 Birkin bags. The collection was called MetaBirkins, which
2 seems like a simple combination of the words "Birkin" and
3 "metaverse." And they were promoted like a brand.

4 And, in fact, in his Yahoo! Finance article --
5 interview, rather, Mr. Rothschild told us that was what he was
6 doing, bringing the Birkin into the metaverse. We're going to
7 come back to that a few times.

8 And what happened next was confusion followed, right.
9 And then Mr. Rothschild teased the Hermès rodeo horse as a
10 charm. And then he announced that there would be up to 1,000
11 more, 900 more MetaBirkins. And even though Hermès made a very
12 public statement to the *Financial Times*, something you heard it
13 never does, confusion continued.

14 Now, let's think about trademarks for a minute.
15 Trademark infringement is not generally a side-by-side
16 comparison. We think about market conditions, right. And you
17 kind of heard a little bit of that colloquy when Ms. Wilcox and
18 Dr. Neal were talking.

19 And what do I mean by that?

20 Hermès Birkin handbags and Mason Rothschild's NFTs are
21 not usually sold -- and nobody would encounter them --
22 side-by-side, right.

23 And let's look at a few slides we're going to run
24 through of some Birkin bags and some of the MetaBirkins.

25 Now, imagine if you saw the Birkin bag a week or two

1 ago or a month ago, and then saw the corresponding MetaBirkin.
2 Each Birkin bag I'm showing you here is an exhibit you have in
3 front of you. Some of them were exhibits that Nicholas Martin
4 discussed and he went through. Others are exhibits about media
5 coverage and magazines and movies.

6 Now, Mr. Martin and Mr. Chavez told you that Birkin
7 bags had been made in every color combination imaginable. It
8 had included a number of materials. Do these look that
9 different to you? If you saw the Birkin bag on the left two
10 weeks ago, three weeks ago -- I'm sorry, and then the
11 MetaBirkin that's on the right, would you know the differences?
12 They have all the same elements. And Mr. Martin even -- they
13 have the same metallic pieces, they have all the pieces that
14 Mr. Martin discussed. And even on this last one here, if you
15 can hold it here, Humberto, this was one that Mr. Martin
16 actually specifically discussed because as the black hardware,
17 both on the MetaBirkin and on the Birkin.

18 Mr. Martin and Dr. Kominers explained Mr. Rothschild
19 was building a brand. And that testimony was not rebutted by
20 Mr. Rothschild. We all remember Dr. Kominers' chart showing
21 that in every way, the MetaBirkins were actually a branded NFT.
22 And Dr. Kominers' unrebutted testimony was that for these types
23 of NFTs, there are two distinct submarkets, art only and
24 digital brand. Obviously there are other types of NFTs, but we
25 remember this chart, right.

1 And with the digital brand NFTs there is some creative
2 component. But the NFT creator builds a brand identification
3 and value component by offering other benefits.

4 Now, Dr. Kominers called those utilities. I'm going
5 to call them benefits, because I think it makes a little more
6 sense to me.

7 And here we know that those benefits were utilized by
8 Mr. Rothschild. And we know that in promoting the MetaBirkins
9 project, Mr. Rothschild expressly promoted the MetaBirkins NFT
10 as a successor to or somehow in league with the most well-known
11 and most successful digital brand NFT projects, including the
12 Bored Ape Yacht Club and Doodles.

13 Dr. Kominers also evaluated the MetaBirkin sales. Dr.
14 Kominers did an economic analysis. His unrebutted conclusion
15 was that the MetaBirkins sold at the amounts they did because
16 of the Birkin name. We were all here when Mr. Rothschild's
17 counsel asked whether it could have been because consumers just
18 liked the art. Dr. Kominers gave you the answer: No. And we
19 don't have any information to the contrary. Dr. Kominers'
20 testimony was unrebutted. Mr. Rothschild produced no evidence
21 that a single person was interested in these MetaBirkins
22 because the images depicted on them. Not a shred of evidence.

23 Now, Mr. Rothschild's counsel complained about these
24 exhibits right here, because they did not include the outliers
25 that are removed. And I'll likely do that again. But my guess

1 is that to do that, they will either make their own charts
2 which shrink this, or they'll have to go up really high. And
3 either way, the message will be the same: The MetaBirkins art
4 outlier, even if they are greater outliers, they are an
5 outlier.

6 Dr. Kominers then went through the entire sales
7 system, and he showed something very clearly. The MetaBirkins
8 were sold at high prices even before people knew which
9 MetaBirkins they were buying. The point was that someone
10 paying \$40,000 for the MetaBirkins that we see right here on
11 the left side of the screen, they might get a plain yellow
12 MetaBirkin or they might get the *Mona Lisa*. They didn't know
13 which one. When they made the purchase, the image was still
14 under a shroud.

15 And Dr. Kominers' point – which, again, was entirely
16 un rebutted – is that people are willing to spend that kind of
17 money because of the name MetaBirkins. They didn't know what
18 art piece they were getting, if we were to call it "the art
19 piece," which I think we are.

20 Now, Nicholas Martin testified about Hermès's concern
21 about the *Yahoo! Finance* interview. And Dr. Kominers saw the
22 same thing, because in that interview Mr. Rothschild said his
23 goal was to create a digital commodity. He didn't talk about
24 an artwork. And his audience understood what that meant; he
25 wanted to buy something usable in the metaverse. He was clear

1 that this was about fashion entering the metaverse.

2 And but we don't have to guess, right. Because
3 Mr. Rothschild told investors that these were metaverse-ready
4 and fully 3D. Did not like the way they looked in certain
5 metaverses, but we see that he took them there. And Dr.
6 Kominers actually showed how easy it was. Even if an avatar is
7 not, let's say, wearing an item or an item is not 3D, it can
8 still be used. We saw that as Dr. Kominers used the exact same
9 kind of purse NFT to move his avatar through the Macy's Day
10 Parade, remember that.

11 And here's where we get to a bit of a tension when we
12 look at an exhibit like this. Because Mr. Rothschild fought
13 back. And this brings up kind of an unattractive topic, which
14 we have to get through, which is Mr. Rothschild's relationship
15 with the truth. It's a strained one. And let's start with
16 what Mr. Millsaps himself said about Mr. Rothschild during his
17 opening statement last week.

18 He said: You will also learn that Mr. Rothschild
19 sometimes exaggerates and embellishes the truth, especially
20 when he is promoting himself and his projects.

21 And here you are stuck deciding which statements of
22 Mr. Rothschild to believe: What he put in writing at the time
23 or what he is saying now, as he is promoting his claim here in
24 court. We'll discuss credibility a little bit more later, but
25 I will give you a different example before going back to this

1 3D issue.

2 In my opening statement, I referred to
3 Mr. Rothschild's statement to his investors that people don't
4 realize how much you can get away with by saying "in the style
5 of." His counsel tried to rehabilitate him. What did
6 Mr. Rothschild say?

7 He said: When I said get away with, I was kind of
8 referring to the situation, I was speaking about this situation
9 that we're in today, where I should be able to get away with
10 creating the artwork because it's my artistic expression and,
11 you know, a company like Hermès shouldn't be able to sue me for
12 it.

13 The only problem is Mr. Rothschild made this statement
14 before Hermès knew who he was. And his statement was made on
15 November 30th or December 1st. And what we're looking at here,
16 it's actually the very page in that text stream before the one
17 we were looking at where he was talking about 3D.
18 Mr. Rothschild wasn't being candid with us when he was
19 explaining.

20 And, you know, Mr. Millsaps is Mr. Rothschild's
21 attorney. He's advocating for Mr. Rothschild. And he told you
22 about Mr. Rothschild. And we heard it another time, when you
23 heard in my opening, I talked about the naming contest. And I
24 talked about a winner named Makisa. And then Mr. Rothschild
25 came up and told us a story about a different winner that he

1 gifted a MetaBirkin to. And then when I asked him and showed
2 him the documents, of course he had to turn back on that.

3 Now, turning back to this 3D issue, it is better --
4 it's better for Mr. Rothschild's case to now say that there was
5 no 3D capability, right. Because that cuts away from what Dr.
6 Kominers was saying. But Mark Berden, who we've called Mark
7 Design, was using 3D software called 2D. Why was he using that
8 3D software? Why would Mr. Rothschild send these images, which
9 clearly are not the 2D MetaBirkins we've seen, but rather some
10 sort of 3D image, if he wasn't planning for something later?
11 The answer is obvious, and it's consistent with what he said in
12 the *Yahoo! Finance* interview: He was planning to bring the
13 Birkin into the metaverse.

14 And then we see a re-tweet like this by him on
15 November 25th, right. And this is another user suggesting that
16 this is the future of metaverse fashion. And Mr. Rothschild
17 decides to publish it. He says he re-tweets it because he
18 thought it was just a good idea. But he's a marker. He was
19 promoting.

20 Now, you also heard Nicholas Martin explain that
21 Hermès was worried that Mr. Rothschild did two more things.

22 First, after asking Mark Berden to create the Hermès
23 rodeo charm and Mr. Rothschild teased it; second, he teased
24 that he would be releasing the greater product.

25 Now, Dr. Kominers' unrebutted testimony again is that

1 this is consistent with a brand. Mr. Rothschild provided no
2 evidence to the contrary. In fact, we see he was planning just
3 that, to create a product line. Mr. Rothschild was planning to
4 make 900 MetaBirkins in a month. He was going to make 500 mare
5 ones, and he was creating his brand.

6 You heard that, at its fastest, it takes Hermès a week
7 to make two Birkin bags. Sometimes they don't even make a
8 Birkin bag in a week. Mark Berden was making 40 to 50
9 MetaBirkins a day. Mr. Rothschild told his purchasing audience
10 on *Yahoo! Finance* that he was creating a digital commodity; and
11 his private statements confirmed what he meant. And that is
12 why Hermès brought this lawsuit. Mr. Rothschild was making a
13 digital brand with his MetaBirkins and that conduct damaged
14 Hermès.

15 So let's turn to Hermès's first claim, trademark
16 infringement.

17 Trademark infringement consists of a balancing test.
18 And you'll see in the instruction that Judge Rakoff will give
19 you that all of the factors are to be balanced.

20 Let's talk -- and there are several of them. Let's
21 talk about the first factor, the strength of the Birkin mark.

22 Now, you're going to see and you're going to hear me
23 talking, you're going to see in the instructions Birkin mark or
24 Birkin trademark. We're really talking about are the two
25 marks, right. We've talked about that. There is the Birkin

1 word mark covering the name, but then there's also the federal
2 registration that covers the bag, except -- other than the
3 handles and the clochette.

4 Mr. Martin testified that the Birkins features -- he
5 testified to what they were when he was holding the bag. And I
6 don't think anyone disputes what those famous features are.
7 Those features are the rectangular shape on the front, the
8 triangular side configuration, the flap that has three lobes,
9 the leather straps that go across the top, the metallic
10 hardware and the clasp. That's all in the federally registered
11 trademark.

12 Mr. Martin also explained that, like other Hermès
13 bags, the Birkin comes with what he called the clochette, the
14 little bell-shaped guard for the key, so that the key -- and you
15 can see on those Birkins there -- doesn't scratch the leather.
16 Sometimes when we see the pictures of the Birkin bag, the
17 clochette is on it, sometimes users take it off.

18 You heard from both Mr. Martin and Mr. Chavez that the
19 Birkin is the bestselling product sold by Hermès out of the
20 thousands of products Hermès sells. It's kind of remarkable,
21 given that in the world of fashion, we're discussing a product
22 that came out in 1984.

23 You've heard that Hermès cannot satisfy customer
24 demand for the Birkin bag. You heard that the Birkin bag is
25 constantly appearing in the media, and you've seen a sampling

1 of the types of coverage that Birkin gets, both in print media
2 and in television and in movies. Most important, all the media
3 coverage is unsolicited. You heard from Bob Chavez that in the
4 U.S., Hermès, in addition to this, spends millions of dollars a
5 year advertising its products, including the Birkin.

6 Most important here, Mr. Martin explained that at this
7 point the Birkin bag is more than just a handbag, it's a status
8 symbol. As he explained, the Birkin bag is more than a
9 handbag, it is something that you own, that you are proud to
10 show, that you are engaged with. Mr. Rothschild agreed. As he
11 said to *Yahoo! Finance*, to him there's nothing more iconic than
12 the Hermès Birkin bag.

13 So on the first of these factors, strength of the
14 mark, it's clear that this factor tips heavily in favor of
15 Hermès.

16 Now, let's look at the second factor, similarity.

17 Here we see the two names: Birkins and MetaBirkins.
18 They are nearly identical. Mr. Rothschild even capitalizes the
19 letter B. No one can seriously question whether, when looking
20 at the term "MetaBirkins," that what pops out is the Birkin
21 name. All we have here is the addition of the generic phrase
22 "meta." And it's Birkins in the metaverse. And that is
23 essentially what Mr. Rothschild said to *Yahoo! Finance*. He was
24 bringing Birkins into the metaverse.

25 When he teased his new collection on Instagram and

1 Twitter, he called them Birkins and asked for names. And on
2 two different social media platforms, a generic choice from
3 different users was given, MetaBirkins, both came immediately.

4 Now, if we look at the images as well, we see that the
5 MetaBirkins incorporate all of the design elements of the
6 Birkin bag. Both everything in its trademark and everything in
7 the commercial implementation as well, such as the clochette
8 and the handles. And we don't have to guess about the accuracy
9 here, do we. Mark Berden used a 3D schematic of an Hermès
10 Birkin bag for the creation of the MetaBirkin. As such, not
11 only were the images identical, the goal was actually making
12 the images identical.

13 Let's turn to factor three, competition. This looks
14 to whether the MetaBirkin NFTs compete for the same consumers
15 as Hermès does. And they do.

16 Hermès defines the Birkin bag as a luxury product.
17 You heard that a few times. Mr. Martin explained that the
18 Birkin bag is also a status symbol that people engage with.
19 That's unrebutted.

20 Mr. Rothschild said almost the same thing in his
21 *Yahoo! Finance* interview. First he discussed his motive,
22 saying he wanted to create a digital commodity that had the
23 same kind of illusion that the Birkin bag has in real life.
24 And then he explained that this introduction of, like, Web3 and
25 the metaverse is allowing us to actually own these commodities

1 in this place where we can actually show them off. I was
2 explaining to somebody before, there's not much difference in
3 between having the crazy car or the crazy handbag in real life
4 because it's kind of just that, that showing of, like, wealth
5 or that kind of explanation of success.

6 And now you're able to bring that into the metaverse
7 with these iconic NFTs.

8 And here he's referring, of course, to the
9 MetaBirkins.

10 These iconic NFTs that have fetched crazy amounts of
11 money in the resale market for NFTs. So I feel like the
12 difference between the two is getting a little bit blurred now
13 because we have this new outlet, which is the metaverse, to
14 showcase our product, showcase them in a virtual world, and
15 even just show them online.

16 Robert Chavez then also testified that Birkin bags
17 actually go up in value after they are purchased. It is a bit
18 unusual, right. And some people even call them an investment,
19 he said.

20 This is exactly what Mr. Rothschild said as well. He
21 wanted the MetaBirkins to double as an investment, like the
22 Holy Grail handbag, as he called it.

23 And we have the unrebutted testimony of Dr. Kominers,
24 who explained that Mr. Rothschild was trying to create
25 community, identity, and other benefits – remember he called

1 them utilities — that come with a brand. It's clear and
2 undisputed that Mr. Rothschild was creating a brand, and that
3 there was -- and that Hermès and the MetaBirkins NFTs were
4 competing for the same types of customers.

5 Let's go to factor four, actual confusion.

6 Now, of course, actual confusion here is quite clear.
7 Mr. Rothschild himself admits to the actual consumer confusion.

8 On December 16, while in receipt of the cease and
9 desist letter from Hermès, Mr. Rothschild told investors his
10 plan. He was going to make an announcement stating: In order
11 to shed confusion between the Hermès bag Birkin and its
12 successor — and, of course, he confirmed for us when he
13 testified that he was calling the MetaBirkins the successor to
14 the Birkin, he didn't call them artwork — that he would change
15 the name to MetaFurkins. This is a plan that he would fail to
16 follow through with though.

17 We know that Mr. Rothschild was trying to get his
18 MetaBirkins covered in the *Financial Times*, which we'll discuss
19 a little bit more later. But what we also know is that Hermès
20 came out with a very strong statement which actually spooked
21 Mr. Rothschild.

22 But what happened next?

23 Mr. Rothschild does an interview with a publication
24 called *Business of Fashion*, and then texts his friends and
25 business colleagues that the word in the media was that the

1 MetaBirkins were a press stunt by Hermès, and that he was
2 working for Hermès.

3 And you heard from Mrs. Vittadini that Hermès was also
4 contacted by the *Business of Fashion* to see whether it was
5 involved in the MetaBirkins. And that was just days after
6 Hermès's announcement in the *Financial Times*.

7 And after that, we see Mr. Rothschild texting his
8 friends who are, again, also his business partner, with a
9 screenshot from the fashion magazine *L'Officiel*. It shows a
10 picture of Mr. Rothschild's website, and the title is "Hermès
11 MetaBirkin NFT Sell for Record Prices Fashion NFTs, Hermès
12 Birkin Bags." And if that text and image are not enough,
13 Mr. Rothschild tells his friends *L'Officiel* thinks that the
14 MetaBirkins are an official Hermès thing.

15 Ms. Vittadini testified that *L'Officiel* was an
16 important fashion magazine; and Mr. Rothschild testified to the
17 same, and that it covers both France and the United States.

18 Ms. Vittadini testified that another one of the most
19 important fashion magazines is out. And we know that on
20 December 17th, *Elle* published an article with the title "Hermès
21 Goes Virtual with Launch of the Birkin Bags as NFTs."

22 Now, although the title of the *Elle* article was
23 quickly corrected, if you look at that *Elle* article itself, it
24 still refers to the MetaBirkins as Birkin NFTs.

25 We also saw that the metadata of the article kept the

1 original title. Ms. Vittadini showed that even though the
2 title was changed, a Google search performed on January 26th,
3 two weeks ago, in New York, one year after Hermès brought this
4 lawsuit, a search for Hermès and NFTs still yielded the *Elle*
5 article as a second hit.

6 (Continued on next page)

1 That's a real consumer impression. Remarkably, on
2 cross-examination, Mr. Harris seemed to suggest that it was
3 Hermès' fault that this metadata had not been corrected.

4 Ms. Vittadini, whether she's right or wrong, testified
5 that she doesn't believe it could be corrected. But if
6 Mr. Rothschild is worried about that, he can correct it.

7 Why didn't he?

8 Now, we fast forward to January 20, 2022, a month
9 after Hermès' statement to the Financial Times, the New York
10 Post published an article saying that Hermès unveiled the
11 MetaBirkin, a version of the signature bag created by LA artist
12 Mason Rothschild. The picture of the MetaBirkins has a caption
13 calling them a be our only MetaBirkin -- I'm sorry -- a digital
14 version of the Hermès name can sell for tens of thousands of
15 dollars.

16 Of course, it was Hermès, not Mr. Rothschild, that
17 corrected this article.

18 You saw another article from challenges magazine from
19 May of 2022, about four months after this lawsuit was brought.
20 This magazine referred to the luxury world investing in NFTs.
21 It started with two examples. One was Gucci, the other was
22 Hermès.

23 The article explains that Hermès unveiled virtual
24 handbags under the name MetaBirkins.

25 And once again it was Hermès, not Mr. Rothschild, that

made this correction.

Mr. Rothschild testified to you that Mr. Loo, his press agent, received other inquiries from the press about the relationship between Hermès on the one hand and Mr. Rothschild and the Birkin handbags on the other.

The only document we saw from Mr. Rothschild was on this. I don't think we have a date here, and the original message was deleted and we don't really have any other information other than the fact that someone in this MetaBirkins community, which Mr. Rothschild posts and curates or moderates, wrote to Mr. Rothschild and asked about the disclaimer on his website and whether Hermès was involved with the MetaBirkin.

You just heard a little while ago the testimony about that disclaimer, and here you somebody on the MetaBirkins community having the same issue.

We also heard from Bob Chavez, and he told you about people here, students here asking about Hermès involvement with MetaBirkins.

And, now, during his opening statement, Mr. Millsaps said that none of the MetaBirkins purchasers were confused. Yet we heard Mr. Rothschild tell you that neither he nor his counsel know the true identity or the personal identity of any of the purchasers other than those that were his friends.

No one had ever talked to these anonymous or

1 pseudonymous individuals. We have Mr. Rothschild's claims to
2 have interacted with some of these purchasers, and we don't
3 have a single piece of corroborating evidence.

4 And, Mr. Rothschild, he hasn't proved completely
5 trustworthy. We do have Mr. Rothschild's other social media.
6 You will see here three separate entries across two pages where
7 potential purchasers were confused, and one purchaser clearly
8 thought she was getting a bag.

9 And while Mr. Rothschild's counsel might tell you that
10 we cannot trust these people, we know that Mr. Rothschild never
11 responded to them.

12 We also know that Mr. Rothschild was leaning into this
13 confusion. Not only did he use the Birkin name, and not only
14 did Mark Design create these bags using the schematic and
15 Hermès Birkin bag, but before the cease and desist,
16 Mr. Rothschild actually teased a charm, and that was meant to
17 look like the rodeo charm, as we know.

18 We also know that there was a survey. We have heard a
19 lot about that for the last few days. And it was done by the
20 top survey expert, Dr. Isaacson. Dr. Isaacson found that the
21 net confusion was 189.7 percent. That means about one in five
22 people seeing Mr. Rothschild's website with the disclaimer were
23 confused.

24 If we are to listen to Dr. Neal, it is one in ten.
25 Again, this factor is not close. People are confused.

Factor five, the degree of care.

You will recall that during Mr. Millsaps' opening he talked about Dr. Isaacson's survey. We heard about it again, and you will recall a lot of discussion about the handbag survey.

That's a classic red herring. You are going to see the jury instruction. The question here is not -- you are not going to see anywhere on your jury instruction any question about whether Hermès' customers would be confused. The only question here is whether a potential NFT customer would be confused.

What we know about the NFT marketplace is that it's highly speculative. Mr. Rothschild and his counsel told you about Mr. Rothschild's initial sales here were for \$450.

The original minters of the MetaBirkins then turned around and put many of them right up for sale. As we discussed, those that were sold were these shrouded images. The highest prices for the MetaBirkins -- I know we have seen this, we are going to see a few of these a few times -- the highest prices were during the period when they were shrouded, when customers didn't know which one they were getting.

Potential purchasers were spending tens of thousands of dollars, and until the unveiling they didn't know, were they getting the yellow plain one or were they getting the Mona Lisa? Mr. Rothschild explained to you there is a clear

1 difference. The ones like the Mona Lisa were much more
2 desirable.

3 And we can see the immature nature of this market with
4 Mr. Rothschild's next project. He testified that the minting
5 fee for that project was either 08 or .1 ETH. Let's assume it
6 was .08 ETH. That was about \$390 at the time because Ether was
7 trading at 350. Last night, when I looked, Ether was worth
8 about \$1600 and bids are now about .03 ETH or about \$48.

9 So the "I Like You, You're Weird" project, which we
10 heard so much about, those NFTs are selling for about 12
11 percent of what they minted for. That drop in price provides
12 us with very keen insight into this NFT mark.

13 It is immature, it is highly speculative, and most
14 people don't know how it works, meaning that people are
15 obviously less careful and sophisticated about their purchases.

16 Now let's talk about bad faith.

17 This is unfortunately not a nice discussion. Like
18 you, I saw Mr. Rothschild on the stand. I think he's charming.
19 I think he's funny. I want to like him.

20 Unfortunately, though, we can't always believe what he
21 says. We have to remember that when considering the testimony
22 of Mr. Rothschild at trial, which contradicts what he wrote
23 before the lawsuit, we have to decide which one we believe.

24 We know obviously that Mr. Rothschild was well aware
25 of the Birkin trademark. We also know that Mr. Rothschild's

1 three prior art projects are appropriated. His first project
2 was the college shirts with the college logo. He admits that
3 at least one of those schools, Parsons here in New York, sent
4 him a cease and desist letter.

5 This MetaBirkins project was going to be his biggest
6 and it wasn't even close. Mr. Rothschild told his friends and
7 associates, some of whom were potential investors, that he was
8 planning to collaborate with Hermès.

9 We saw that on December 2, 2021. Mr. Rothschild
10 texted Lauren from Basic.Space that he was going to be speaking
11 to Hermès on December 4, 2021.

12 He testified that Mr. Clement Quan, a fashion industry
13 executive -- I'm sorry this is December 7, 2021. He testified
14 that Mr. Clement Quan, a fashion industry executive, was
15 planning to communicate with Hermès on his behalf.

16 You see no documents showing that Mr. Rothschild had
17 any discussions with Mr. Quan or Mr. Quan saying that he
18 called. While Mr. Rothschild testified that Mr. Quan knew
19 people at Hermès, in Hermès' promotions department, he never
20 said whom he knew, and Mr. Rothschild claims he never followed
21 up with Mr. Quan. And you heard Ms. Vittadini. She said she
22 had never heard of Mr. Quan.

23 But there are internal inconsistencies here as well.
24 In between December 1 and December 7, Mr. Rothschild claimed to
25 have two other people reaching out to Hermès. The first was

1 his contact at Vogue, whose name he could not remember. That
2 was on December 1. The second was another person at Sotheby's,
3 who he wanted to use to get to Hermès onboard on December 4.

4 If Mr. Quan was reaching out to Hermès, why would
5 Mr. Rothschild in two different discussions then suggest two
6 other lines of communication, both of which he couldn't --
7 well, sorry.

8 This gets even more -- we know that when
9 Mr. Rothschild approached Mark Berden, he said Hermès might be
10 involved with this project. That was clearly before
11 Mr. Rothschild was talking with Mr. Quan, with Sotheby's, or
12 Vogue.

13 We also heard about Aaron Maresky. We saw
14 Mr. Rothschild was hoping for a collaboration with Mr.
15 Mareksy's company. And Mr. Maresky immediately asked whether
16 the relationship with Birkin was official. And Mr. Rothschild
17 responded that he was pushing it for it.

18 We also know Mr. Rothschild told his childhood friend
19 Eric Ramirez that Hermès might partner with him, and that he
20 was negotiating with them. But we know that Hermès has no
21 record of Mr. Rothschild reaching out, and has no record of
22 anyone reaching out on his behalf.

23 Simply put, Mr. Rothschild was misleading people.

24 The reason for bringing up these text messages isn't
25 to embarrass Mr. Rothschild. Rather it is to show something

1 obvious. Mr. Rothschild knew and clearly suspected that
2 everyone would assume that the MetaBirkins project was trading
3 off of Hermès goodwill, he was using the Hermès Birkin name,
4 and he was using the Hermès Birkin trade dress, what we call
5 calling the Hermès marks and the Hermès trademarks.

6 What must be remembered here is that at the time
7 Hermès had no thoughts about Mr. Rothschild. Hermès didn't
8 care about the Baby Birkin NFT, as you heard. Hermès didn't
9 know about Mr. Rothschild's plans for the MetaBirkins. The
10 person bringing up Hermès over and over again was
11 Mr. Rothschild alone. It was to legitimize his project.

12 Now let's assume for a minute that Mr. Rothschild was
13 seeking a collaboration. We can see from Mr. Rothschild he
14 wasn't seeking that collaboration based on the negotiations or
15 permissions that we might think about. He was seeking that
16 collaboration on beating Hermès to the market.

17 Even if the statements about Mr. Quan, Vogue and
18 Sotheby's are all true, those discussions were after the
19 MetaBirkins were released and before Hermès commented.
20 Therefore, these discussions would have been about
21 strong-arming Hermès into some sort of collaboration.

22 While Mr. Rothschild was pushing Mark Design to crank
23 out the MetaBirkins, Mr. Rothschild was promoting. We saw that
24 he took to Instagram and Twitter to run those contests we
25 talked about. He runs the contests using what looks exactly

1 like the Birkin design trademark, teasing an image which he
2 refers to as a Birkin, and asking for a name for the
3 collection. His tweet and his Instagram posts contain no
4 disclaimer.

5 And then let's look at what happened after the Yahoo
6 Finance interview. We saw his publicist Ken Loo try to set up
7 an interview the Financial Times. That was done to promote
8 Mr. Rothschild and the MetaBirkins.

9 He claimed he wanted to discuss people who were
10 selling counterfeit MetaBirkin NFTs. Yet the only information
11 he provided to this reporter was sales, had to do with his own
12 sales. Not once did he provide the information that the
13 reporter was seeking about these fakes.

14 For this article that was set up to promote
15 Mr. Rothschild, we know now that the Financial Times actually
16 reached out to Hermès. Luisa Vittadini explained that she
17 responded by saying there was no affiliation.

18 What did Mr. Rothschild do?

19 He tried to back out. he could have said he wasn't
20 involved with Hermès, that he was trying to do a tribute or
21 whatever else. He didn't do that. He ran away.

22 The article from the Financial Times, however, was a
23 pretty clear public statement by Hermès, and that was on
24 December 10, 2021.

25 We see that the only time Mr. Rothschild began to use

1 this disclaimer was after Hermès -- was not even after this
2 article. It was several days later, after Hermès actually sent
3 the cease and desist. And we know that the disclaimer didn't
4 remedy confusion.

5 And now at one point during this trial Judge Rakoff
6 asked Mr. Rothschild whether he was trying to reference Hermès'
7 Birkin bag. His response is that he was in some ways. We will
8 talk about that again.

9 But in Yahoo Finance he was a bit more plain about his
10 intentions. He wanted to take the iconic Birkin handbag and
11 bring it into the metaverse.

12 Can be there any clearer evidence that Mr. Rothschild
13 was trying to trade off of Mr. Hermès goodwill?

14 Perhaps Mr. Rothschild will argue that he tried to
15 correct mistakes, and if he did, it was clearly only after he
16 received the cease and desist letter from Hermès.

17 Mr. Chavez, Mr. Martin, Mr. Rothschild, Mr. Moulin,
18 and Dr. Kominers all told you that the metaverse is the future
19 or part of the future for fashion. Everyone knows this. They
20 all cited examples Gucci, Prada, Balenciaga, Nike, and Adidas,
21 among others.

22 Mr. Rothschild as a trend forecaster -- remember he
23 said he is a trend forecaster and a marketer -- clearly
24 understood that brands were entering the metaverse. It is
25 beyond question that he was trading off the two Birkin

1 trademarks, to trade off of Hermès' goodwill, and he knew
2 Hermès was going to be upset.

3 Now let's talk about Hermès' plans to enter the
4 metaverse, the seventh factor. Again, we think all these
5 factors tip only in favor of Hermès, as will this one.

6 You heard from four different witnesses about Hermès'
7 plans for NFTs in the metaverse. It is undisputed of course
8 that other brands have been involved with NFTs and have entered
9 the metaverse, but Hermès doesn't make those plans public.

10 You heard from Mr. Chavez, Mr. Martin, Mr. Moulin,
11 Ms. Binoche that Hermès is very careful. Everyone was very
12 clear, and I don't think Mr. Rothschild will disagree, that
13 Hermès makes only the highest quality products. And that the
14 ethos, that ethos it is apparent here as well.

15 You saw plans dating back to 2019 which are quite
16 sophisticated. The person in charge on the technical side,
17 Mr. Moulin, has a number of degrees, and actually built the
18 largest data network for the largest phone company in France.

19 You heard him and Ms. Binoche say that they were
20 working with digital artists for a number of projects,
21 including some related to NFTs and the metaverse.

22 You heard from Mr. Martin, however, that Hermès
23 actually filed trademark applications for NFTs in the
24 metaverse. They did that here in and in France. You also
25 heard from various Hermès witnesses, such as Mr. Chavez,

1 Mr. Martin, Ms. Binoche, and Mr. Moulin, that Hermès often
2 collaborates with artists. It celebrates those collaborations.

3 You saw Hermès's website, which is up here. It
4 credits the artists that work on its products. You saw that
5 when it comes to product like scarfs, Hermès actually has the
6 artists sign those products.

7 You have seen it with the Birkin bags, where it
8 actually promotes the artist who is involved. When Hermès
9 works with an artist, it lets the world know. Now Hermès' plan
10 for the metaverse and NFTs were private. You actually got a
11 world premier, right, for the publication of those plans. You
12 were the first people outside of Hermès to actually see these
13 plans and the first ones to see this horse.

14 And as we know and as you heard, this NFT is not
15 attached to a product. Indeed, Mr. Moulin's presentation
16 showed a number of other NFTs uses, like this digital twin, and
17 those that include NFTs as a mere picture to use in a virtual
18 world.

19 And when you get the jury instructions, it is not --
20 this requires -- this factor only requires that Hermès have
21 concrete plans prior to Mr. Rothschild accused conduct. It
22 doesn't require that Mr. Rothschild know about these plans.

23 As the instructions are going to explain, you are to
24 balance these different factors. But as you have seen here,
25 there's evidence in only one direction on each of them, and it

1 tilts towards Hermès.

2 Let's talk a little bit about dilution. The next
3 cause of action. Whatever you decide on trademark
4 infringement, the claim for trademark dilution it is a totally
5 separate claim. And again the judge will instruct you on the
6 law, but generally speaking trademark dilution occurs when
7 someone uses a trademark that is similar to a famous mark and
8 that use harms the famous mark's distinctiveness. That kind of
9 dilution is called blurring.

10 Here we have a very famous trademark, Birkin. But the
11 more people that start using the Birkin name, the less it will
12 operate as a way to denote Hermès' Birkin handbags. Put
13 differently, the more people that use this trademark, the less
14 likely people will be to associate it with Hermès.

15 It might be helpful if we give a hypothetical example.
16 We all see Starbucks every day. You know it sells coffee and
17 some pastries and other items.

18 Now, if a cosmetics brand came out with Starbucks
19 cosmetics and a sports brand came out with Starbucks skis and
20 somebody else came out with sports cars, Starbucks sports cars,
21 none of those would be likely to infringe the Starbucks
22 trademark, but each one of them would actually damage
23 Starbucks.

24 Now I am making these up obviously, but you could
25 understand very easily how Starbucks would lose its

1 distinctiveness, how suddenly when someone talked about
2 Starbucks you would say, is that the car company or is that the
3 ice hockey or that the coffee company?

4 But nonetheless it would do damage, right? Once
5 others use Starbucks, the original Starbucks loses the value in
6 its brand.

7 The same is true here with Birkins, which is sold by
8 Hermès. It is kind of a tricky concept. The best analogy I
9 have about dilution is a bee sting. Each time someone uses a
10 famous mark, it is like a bee sting to the brand owner.

11 The brand owner might not be hurt by one sting, but as
12 soon as one bee is permitted to sting, so is another. So today
13 we have MetaBirkins. Tomorrow we could have the same sold
14 thing as NFT Birkins or Birkin NFTs or web Birkins or digital
15 Birkins or internet Birkins or web 3 Birkins.

16 If that happens, the term Birkin is much less
17 distinctive than it is now. Suddenly the term Birkin can
18 almost be used by anybody. The value of the trademark is
19 significantly diminished.

20 Turning back to the bee sting analogy, at some point
21 each additional sting is more and more damaging, and it kills
22 the brand. The law of dilution allows the trademark owner to
23 stop the very first bee sting that dilutes the brand. And that
24 is what we are discussing here.

25 You heard both Nicholas Martin and Maximilien Moulin

1 discuss that they were concerned, that as soon as Hermès became
2 involved with NFTs publicly, or as soon as there a Birkin NFT
3 project, they feared that the MetaBirkins would come to mind.

4 And we saw what happened when Luisa Vittadini did the
5 Google search for Hermès NFTs. That's the reason Hermès is
6 bringing the dilution claim.

7 Now let's talk the factors of a dilution claim. Just
8 like trademark infringement, dilution is based on a few
9 factors.

10 Here there are three:

11 First, whether the Birkin mark is famous;

12 Second, whether it became famous before Mr. Rothschild
13 sold the MetaBirkins; and

14 Third, whether Mr. Rothschild's use is likely to
15 dilute the distinctiveness of the Hermès brand.

16 Now, when it comes to the first two factors, the
17 Birkin mark's fame and whether it was famous before
18 Mr. Rothschild began using it, they are really not in dispute
19 here. You heard from both Nicholas Martin and Bob Chavez about
20 its fame. You heard about the TV shows and the movies, and we
21 have a great deal of evidence concerning the different
22 magazines and newspapers. You even heard about the Sex and the
23 City episode which is all about the Birkin bag.

24 You heard about the fact that, even though Hermès has
25 sold over \$1 billion worth of Birkin bags in the last ten years

1 alone in the U.S., that Hermès still cannot meet customer
2 demand.

3 Whether we call it a waitlist or wish list doesn't
4 really matter. The impact is the same. The customer demand
5 for Birkins far outpaces Hermès ability to make these bags.
6 And again we have Mr. Rothschild's own opinion that nothing is
7 more iconic than the Hermès Birkin bag.

8 Finally, though I suspect Mr. Rothschild's counsel
9 will come in and argue something different, here's what he said
10 last week: The name Birkin has transcended its status as a
11 mere trademark indicating the source of goods, and Birkin has
12 become a cultural symbol of rarefied wealth and privilege in
13 our society. In short, last week, this was a part of their
14 defense.

15 Now, the third factor is whether or not
16 Mr. Rothschild's use is likely to dilute. And it is probably
17 becoming apparent that we lawyers like to use the factors, and
18 we have five subfactors for this factor.

19 Those five factors are: The degree to which the
20 trademarks are the same, the strength of the Hermès trademark,
21 the degree to which the Birkin is widely recognized, whether
22 Mr. Rothschild intended to create an association with the
23 Birkin mark, and any actual association by consumers.

24 Once again, there's very little dispute on most of
25 these factors. Birkin and MetaBirkins, they're pretty darn

1 similar. The Birkin mark is strong, as we discussed just
2 before. We also know that the Birkin mark is widely
3 recognized.

4 And, again, in addition to all the other evidence
5 submitted by Hermès, you have this statement by Mr. Rothschild
6 that there is nothing more iconic.

7 And then when discussing Mr. Rothschild's intent,
8 while there is a great deal of evidence during the trial, Judge
9 Rakoff asked this: "And you intended to associate, to indicate
10 to the people who were accessing this that this was in some
11 sense a reference to Birkin bags, yes?"

12 "In some ways yes, a reference."

13 And the final factor is whether or not consumers made
14 that association.

15 Here, we have the meeting which was dedicated to
16 fashion and/or articles talking about the MetaBirkins. These
17 articles all show a belief that Hermès was involved with the
18 MetaBirkins.

19 Let's also remember that the world of NFTs and the
20 metaverse are still new. If you read these articles, wouldn't
21 you have thought that Hermès was involved in the MetaBirkins?
22 Some of these articles, such as the one with the New York Post,
23 show other fashion brands entering the metaverse.

24 Do you have any doubt about the other fashion brands
25 that are mentioned?

1 Do you have any doubt that other people reading this
2 would come to that conclusion?

3 You heard Mr. Rothschild and Hermès testify that
4 brands are in fact entering the metaverse, and you have seen a
5 few pictures of those other brands in the metaverse.

6 Why would anybody coming across these articles
7 question that Hermès is not the source of the MetaBirkins?

8 Of course, what can't be forgotten here is that
9 Mr. Rothschild, and more precisely Mark Berden, worked from a
10 schematic of the Hermès Birkin bag. And you must remember the
11 entire configuration of the Birkin bag, other than those
12 handles, are subject to another trademark.

13 Obviously the clochette and the handles are on the
14 actual Birkin bag, as you have seen, and Mr. Rothschild
15 succeeded in creating this association, and this was an example
16 of the bee sting for Hermès. As I said, Hermès has the
17 absolute right to stop these bee stings for the dilution, which
18 has happened.

19 Now, I told you this type of dilution is called
20 blurring. Let's look at what Mr. Rothschild said in the Yahoo
21 Finance article. He said there's not much difference in
22 between having the crazy car or the crazy handbag in real life,
23 because it's kind of just that, that showing of, like, wealth
24 or that kind of explanation of success. And now you're able to
25 bring that into the metaverse, where these iconic NFTs that

1 have fetched crazy amounts of money in that resell markets for
2 NFTs, so I feel like the difference between the two is getting
3 a little blurred now, because we have this new outlet, which is
4 the metaverse, to showcase our products, showcase them in our
5 virtual world, and even just show them online.

6 Again, this is a balancing test, but it is clear that
7 every factor here balances heavily in Hermès' flavor -- favor.

8 Now, let's talk about the third claim Hermès has made,
9 cybersquatting. The claim here again is for cybersquatting,
10 and -- apologies -- once again, it's three factors. They're
11 kind of similar to the ones we have heard about.

12 Factor one, was the Birkin mark distinctive when
13 Mr. Rothschild registered his domain name, and we know it was.

14 Factor two, the MetaBirkins domain main is identical
15 to or confusingly similar to the Hermès Birkin mark. Here we
16 can see it sure is.

17 Factor three is that Mr. Rothschild had a bad-faith
18 intent to profit from the Birkin bag.

19 Now, the question of whether Mr. Rothschild intended
20 to profit from the Birkin trademark is also pretty clear.

21 Mr. Rothschild never used the word "art" when discussing his
22 project.

23 You can look through the exhibits. We did not see the
24 word "art" used by Mr. Rothschild until after the MetaBirkins
25 were released. We saw him talking about pumping and shilling,

1 getting the price raised. That is an intent to profit.

2 Once again, in response to the direct question from
3 Judge Rakoff Mr. Rothschild told you that his intent was at
4 least in part to invoke Hermès' Birkin. That is enough to show
5 that Mr. Rothschild's intent was to profit from the Birkin
6 trademark. And on that record there's no question that once
7 again all of these factors point in Hermès favor.

8 Let's talk Mr. Rothschild's main defense, which you
9 heard a lot about last week, which is the First Amendment,
10 which frankly is not technically a defense. I'm sorry I said
11 it that way.

12 Mr. Rothschild claims that his conduct is protected
13 under the First Amendment. You will see that Judge Rakoff in
14 his instructions is providing a very clear and understandable
15 test.

16 We have to ask ourselves in looking at that test, did
17 Mr. Rothschild use the Birkin image and the Birkin word mark
18 for a commercial reason?

19 He did. It was a commercial choice. It was an intent
20 to profit through confusion.

21 And even if we assume that the pictures of the
22 MetaBirkins are artistic, did he have to use them -- did he
23 have to copy them identically piece for piece? Did he have to
24 use the Birkin maim. Why did he chose those names? Why did he
25 choose to copy completely?

1 To trade off of goodwill.

2 Mr. Rothschild's counsel may get up here and argue
3 that the choice of MetaBirkins was commentary and that he
4 describes the picture.

5 I am not sure whether that's right, but it is clear
6 that Mr. Rothschild didn't come up with a name for artistic
7 purposes or for any purposes other than to confusion. As we
8 know, a couple of other people came up with this name. We know
9 that at least part of the reason that Mr. Rothschild came up
10 with this name and he sent it to the community was to help
11 promote and sell these NFTs. It wasn't for another purpose.
12 It was a name for a collection.

13 Now, Hermès is going to be the party that has to prove
14 that Mr. Rothschild was motivated by commercial intent and by
15 trying to confuse the consumer and to capitalize on Hermès
16 goodwill in the Birkin name.

17 But this is all quite clear, isn't it? The different
18 users that came up with this name did so in the first day of
19 the contest. If we look at what Mr. Rothschild said he was
20 doing in the Yahoo Finance article, he was said was bringing
21 Birkins into the metaverse.

22 That description is telling. He is not saying that he
23 is creating art. He's trying to describe what he is doing with
24 what he calls a digital commodity in that article.

25 The name is not about art. It is a commercial choice

1 meant to convey that he is working with Birkins. That name was
2 meant to exploit the popularity in the goodwill, consumers
3 associate with the Birkin trademark and the Birkin trade dress.
4 This has nothing do with art. This is to confuse consumers.

5 Now let's go back to Dr. Kominers. Dr. Kominers
6 methodically went through all of Mr. Rothschild's activity. It
7 was clear that Mr. Rothschild was engaged in brand building.
8 And we know he succeed.

9 As Mr. Kominers explained without a single shred of
10 rebuttal from Mr. Rothschild, the MetaBirkins sold at the
11 prices they did because of their name.

12 Let's go back to this chart. You know, I know I have
13 said it a few times, and I'm sorry to repeat myself, but the
14 highest prices were fetched when these NFTs were still shrouded
15 and people didn't know what they were getting.

16 Ask yourself the obvious question:

17 Who pays \$40,000 without knowing what piece of art
18 they are getting? The answer, of course, is people who assume
19 they're buying into a brand. That's what Dr. Kominers
20 explained.

21 While Mr. Rothschild gave reasons for his pump and
22 shill comment, he was seeking influencers to help him for two
23 reasons:

24 The first was to drive up prices. He admitted that.

25 The second, and less obvious, is that he was trying to

1 replicate what Hermès does. He talked about celebrities
2 showing their Birkins. That's exactly what Mr. Rothschild was
3 trying to emulate with the MetaBirkins. He told you about what
4 happens at Terminal 27. He's trying to do that. The big
5 difference, Hermès doesn't pay for it. Mr. Rothschild did, to
6 create that illusion.

7 And, again, Dr. Kominers' unrebutted testimony is that
8 a great deal of brand building happened before the MetaBirkins
9 were even released.

10 Let's take a look at some of Mr. Rothschild's other
11 comments.

12 We have Mr. Rothschild explaining his royalty as
13 luxury product, luxury tax baby.

14 Mr. Rothschild began thinking about a TikTok campaign;
15 hashtag finally got my Birkin.

16 We have his tweets associating himself with Doodles
17 and Bored Ape brands.

18 We see him forwarding a tweet by Lana Rhoades --
19 that's a piece of testimony I am never going to forget -- where
20 he suggested that people use their MetaBirkins as a profile
21 picture.

22 That's a clearly commercial endeavor.

23 We saw blog posts and social media posts by
24 Mr. Rothschild calling the MetaBirkins the key to unlock his
25 future projects and giving away gifts like diversified white

1 list spots and airdrops for future projects for people that buy
2 the MetaBirkin. He did this before the MetaBirkins were
3 released.

4 We even saw Mr. Rothschild promise white list spots,
5 essentially a gift, for people who joined the community.

6 Can you go back one slide, please, Humberto.

7 On this document you will see that's where he promised
8 the people who just joined the MetaBirkins community. It's got
9 nothing do with the art project.

10 Now -- sorry, if you could go back.

11 If you look at Mr. Loo's correspondence with the
12 Financial Times, which I talked about a little bit earlier, and
13 Mr. Rothschild's interview with Yahoo Finance, we see that
14 Mr. Rothschild was claiming that people were selling fake
15 MetaBirkins.

16 Now, of course, Mr. Rothschild declined to provide any
17 corroborating evidence concerning those fake MetaBirkins. And
18 he volunteered the allegation actually when -- in response to a
19 Yahoo Finance reporter asking him if, like Birkins, his product
20 was being knocked off. Now, if Mr. Rothschild was making this
21 up, it was to enhance the credentials of the MetaBirkins as a
22 luxury brand, in short, a marketing ploy.

23 If, on the other hand, Mr. Rothschild was telling the
24 truth and was upset about the fake MetaBirkins, it also tells
25 us that he was thinking about MetaBirkins as a brand, right?

1 Not a work of art.

2 We also see that Mr. Rothschild was trying to build a
3 brand when he used Hermès' rodeo charm, which he planned to
4 sell as part of his MetaBirkins brand.

5 We also see a text where he's telling his potential
6 investors that he can launch anything, but definitely wants
7 more Birkins.

8 And, again, going back to Yahoo Finance,
9 Mr. Rothschild said he wanted to garner the attention of people
10 and build that relationship with the consumer.

11 We know that Mr. Rothschild was seeking profits. We
12 have this discussion with Mark Berden asking all about speed.
13 He didn't care about color or design. He wanted to crank out
14 images. Mr. Rothschild told his collaborator Mark Berden that
15 he was sitting on a gold mine.

16 He sought to entice influencers by talking about the
17 value the MetaBirkins might fetch.

18 In short, Mr. Rothschild made his intent plain. He
19 wanted to cash in on the Birkin name. That was the only reason
20 for the project.

21 If you get to the point to wonder whether or not
22 Mr. Rothschild's conduct was explicitly misleading or whether
23 his use of the MetaBirkin name itself was explicitly
24 misleading, you can think about everything we discussed earlier
25 in connection with the other factors, especially the good faith

1 evidence.

2 Remember, in his own words: I don't think people
3 realize how much you can get away with in art by saying in the
4 style of. That's his statement to his investors.

5 We know that Mr. Rothschild adopted the Birkin name
6 and used the configuration of the Birkin bag to make money. We
7 know his goal was for these NFTs to sell at as high of a price
8 as possible. We know that people purchased these NFTs because
9 it was affiliated with a brand. Dr. Kominers' unrebutted
10 testimony makes that very plain. And we know that
11 Mr. Rothschild succeeded.

12 Not only did we discuss the press and the few comments
13 on social media, but we have Isaacson's survey. Dr. Isaacson
14 says 18.7 percent of potential NFT customers, or almost one in
15 five people, were confused.

16 Dr. Isaacson showed Mr. Rothschild's web page without
17 any changes, and one in five thought it was either Birkin or
18 Hermès.

19 But let's even say we want to believe Dr. Neal's
20 critique. It's one in 10. Right? That's how many people are
21 confused. As such, Mr. Rothschild's conduct doesn't get saved
22 by the First Amendment.

23 Now, as I said, I am going to switch a little bit here
24 to damages. As I said a little while earlier, Hermès is not
25 seeking to punish Mr. Rothschild. If punishment were Hermès'

1 goal, it would have put on a big case showing all the costly
2 ways that it is going to have to deal with correcting the
3 marketplace.

4 But had Mr. Rothschild stopped when Hermès sent the
5 cease and desist, or frankly anytime before trial, we wouldn't
6 be here. But he didn't. He didn't want to do that. He didn't
7 want to walk away.

8 Instead, Mr. Rothschild tried to profit from his
9 violation of Hermès' trademark rights. And the judge is going
10 to instruct you that Hermès has the burden of proving the
11 amount of money Mr. Rothschild received.

12 Let me just back up and say Hermès is only seeking
13 Mr. Rothschild's profits. It is not seeking its own damages.
14 As I said, the judge will instruct you. You will see in your
15 instructions that Hermès has the burden of showing how much
16 money Hermès made, and Mr. Rothschild then has to show you his
17 expenses.

18 Dr. Mentzer's testimony here shows precisely how much
19 money Mr. Rothschild made. Mr. Rothschild hasn't provided any
20 evidence concerning his expenses, but actually we did that for
21 him in the Mentzer report. As such, the proper amount of
22 damages here on Hermès's infringement and dilutions claim is
23 the amount set forth by Dr. Mentzer here, \$231,000.

24 On Rothschild's -- on the cybersquatting claim rather,
25 it is statutory damages. You are allowed to pick a number from

1 \$1,000 to \$100,000. That's your discretion.

2 This really should be a pretty simple case. You might
3 ask yourself, why did Hermès go to all this trouble? Why pay
4 for the two law firms, why pay for the experts? You heard how
5 expensive they were.

6 It is because Hermès takes that really seriously.
7 Hermès has built out its property. You heard about 180 years
8 or almost 190 years that Hermès has been working to develop its
9 brand.

10 You have heard about 42 years with a Birkin bag. If
11 you look at the big report in your file about Hermès' finances,
12 you will see that it has thousands and thousands of employees
13 around the globe. It has 32 stores here in the U.S.

14 All those people work. This is their prime product.
15 They can't let people sidle up to it. They had to bring this
16 claim because Mr. Rothschild wouldn't stop using it.

17 On all the causes of action here, I showed you it's a
18 balancing test. There's not really much dispute about any of
19 it.

20 Mr. Rothschild tried to trait off on Hermès' goodwill,
21 he used their trademark, he used the identical trade dress, and
22 he succeeded.

23 I again want to thank you for your attention and for
24 your help here.

25 THE COURT: Thank you very much.

1 We will hear now from defense counsel.

2 MR. MILLSAPS: Thank you, your Honor.

3 It is always a privilege to try cases in this
4 courthouse.

5 Good morning, members of the jury. You have been an
6 impressively attentive jury in this case and I really
7 appreciate that. I know my colleagues appreciate that
8 Mr. Rothschild appreciates that as well.

9 I am going to begin this summation and then I am going
10 to turn it over to my colleague, Jon Harris. We are looking
11 forward to speaking with you and then placing this case into
12 your hands.

13 Now, my opposing counsel just threw a flurry of
14 information at you, so I am going to slow this down because
15 this is actually a simpler case than you might think from that
16 presentation that you just saw.

17 Under the law, Hermès is entitled to certain rights
18 and protections in the Birkin trademark. Nobody disputes that.
19 That's a big deal. That is a really big deal. It's meaningful
20 to give a company the rights to a word, to a trademark, but
21 that is what the law provides.

22 No one can open a website or a luxury goods store on
23 Madison Avenue and start selling \$12,000 handbags called
24 Birkins. But because it's such a big deal to give a company
25 the exclusive right to use a word to sell its products, the law

1 also provides limitations. One of those limitations goes to
2 the purposes of trademark law. The heart of trademark law is
3 to protect consumers from confusion, so that when you go to
4 your local market and you buy a can of Coca-Cola, you know what
5 you are getting and you know who you're getting it from.

6 So in order to bring a trademark infringement claim,
7 Hermès must be able to show a real likelihood of confusion
8 among potential consumers.

9 No real likelihood of confusion among consumers, no
10 claim. Period.

11 The other limitation of trademark law is based on the
12 First Amendment of our Constitution. The First Amendment
13 protects freedom of speech and expression, including artistic
14 expression. When we are dealing with art, like we are here
15 with the MetaBirkins, the First Amendment bars liability on all
16 the claims by Hermès unless Hermès can prove -- I am going to
17 read this from the jury instructions that Judge Rakoff is going
18 to give you when I'm done speaking: Mr. Rothschild is
19 protected from liability on any of Hermès' claims unless Hermès
20 proves by a preponderance of the evidence that Mr. Rothschild's
21 use of the Birkin mark was not just likely to confuse potential
22 consumers, but was intentionally designed to mislead potential
23 consumers into believing that Hermès was associated with
24 Mr. Rothschild's MetaBirkins project.

25 You will see that on page 21 of the instructions that

1 you will be given. That simply is not what the evidence shows
2 in this case.

3 Now, I understand that Hermès doesn't like
4 Mr. Rothschild's art or respect him as an artist. That's
5 obvious. But they are a French global corporation with more
6 than \$10 billion in annual sales and over \$100 million in
7 annual sales of these Birkin handbags in the U.S. alone, and
8 they want more than the law gives them.

9 They want more than what our Constitution gives them.
10 While this case is about MetaBirkins and it is about
11 Mr. Rothschild and it is about Hermès and its Birkin handbags,
12 it is also about more. It is about the freedom that our
13 Constitution grants for artistic expression, all artistic
14 expression, good art, bad art, conceptual art, NFT art.

15 That includes art that depicts brands and products
16 that are in our faces every day everywhere we look, especially
17 a brand or a product like the Birkin bag, which has become a
18 symbol in our culture of wealth and provide.

19 But art is in conversation with the world and brands
20 and products are a big part of our world today. They have
21 enormous power and influence over us. So it's not surprising
22 that they're the target of artists and artistic experiments
23 like what Mr. Rothschild was doing here.

24 Now, Judge Rakoff is going to tell you in your
25 instructions that MetaBirkins are artistic works. The linchpin

1 of this case is that Mr. Rothschild unquestionably wanted the
2 credit for his own artwork. He told everyone he was the
3 creator, and he never tried to mislead anyone into believing
4 that the MetaBirkins came from Hermès. That's the bottom line
5 here.

6 Also, no one was hurt. You heard from Hermès' first
7 witness Robert Chavez, the president of Hermès in the U.S., a
8 really nice and impressive guy, that's there is no evidence
9 that MetaBirkins hurt any Birkins sales. In fact, you heard
10 him testify that Birkins sales had continued to increase year
11 over year even after Mr. Rothschild put out his MetaBirkins.

12 That was repeated by Hermès' third witness,
13 Mr. Martin, who's been in the courtroom for the whole trial.
14 There is no evidence that any actual purchaser of MetaBirkins
15 was confused about what they were getting or where it came
16 from.

17 I am going to discuss the First Amendment protection
18 here, and then Mr. Harris will discuss with you consumer
19 confusion and Hermès' specific claims. And if you agree that
20 the First Amendment protects Mr. Rothschild because he did not
21 intentionally and explicitly mislead anyone about who created
22 MetaBirkins, that is enough for you to render a verdict on
23 behalf of Mr. Rothschild on all of Hermès' claims. You will
24 see that on page 21 of your jury instructions.

25 Beyond that, if you agree with what Mr. Harris has to

1 say after me, that is a separate and independent reason for you
2 to find in favor of Mr. Rothschild on all of Hermès' claims.

3 When we're done speaking with you, Judge Rakoff is
4 going to give you the set of instructions that I have been
5 referencing, and he'll explain to the law to you and your job
6 when you go back into the jury room to deliberate about all of
7 the evidence that you have seen over the last week.

8 Judge Rakoff is going to instruct you that
9 Mr. Rothschild's MetaBirkins are, at least in some respects,
10 works of artistic expression and so they are protected by the
11 First Amendment, unless Hermès can clear a very high bar in
12 this case. Judge Rakoff will instruct you that the First
13 Amendment bars liability on all of Hermès' claims unless Hermès
14 has proved, again, unless Hermès has proved that
15 Mr. Rothschild's use of the Birkin mark was not just likely to
16 confuse potential consumers, but was intentionally designed to
17 mislead potential consumers into believing that Hermès was
18 associated with Mr. Rothschild's MetaBirkins project. I'm
19 sorry. It is a mouthful, and I am just reading it.

20 If anything is clear from the evidence that you have
21 seen and the testimony that you have heard, it's that
22 Mr. Rothschild had no intention to mislead anyone into
23 believing that MetaBirkins came from Hermès. He made clear
24 that he was the creator everywhere he could because he wanted
25 the credit for his own artwork. You saw him testify. He was

1 proud of it.

2 Ashley, would you please put up Mr. Martin's
3 testimony.

4 You heard Hermès' representative, Mr. Martin, testify
5 that he has no evidence that Mr. Rothschild ever told anyone
6 that MetaBirkins came from Hermès.

7 Ashley, would you please show the MetaBirkins website.

8 You have seen that Mr. Rothschild identified himself
9 as the creator of MetaBirkins on the MetaBirkins website. And
10 when Hermès sent him a cease and desist letter, he even put up
11 a disclaimer on the website to make clear, doubly clear that
12 Hermès was not affiliated with MetaBirkins.

13 Ashley, would you please show the MetaBirkins
14 Instagram page.

15 Mr. Rothschild identified himself on the MetaBirkins
16 social media pages like the MetaBirkins Instagram pages that
17 you see here.

18 Ashley, would you please show the MetaBirkins Rarible
19 page.

20 Mr. Rothschild also identified himself on auction
21 platforms where he was able to, like he did here on Rarible.
22 You can see it says, A digital art project by Mason Rothschild
23 living on the Ethereum blockchain.

24 Mr. Rothschild identified himself in media interviews
25 as the artist who created MetaBirkins.

Ashley, would you please play the Yahoo Finance clip.

(Video played)

MR. MILLSAPS: You saw that Mr. Rothschild ran a public channel on the Discord platform where he constantly interacted with his MetaBirkins audience. Mr. Rothschild made clear in this public Discord channel --

And, Ashley, could you put up the first.

-- he made clear in the public Discord channel that he was the one behind MetaBirkins. You can see here, when he posted on December 22, 2021: No, like every disclaimer says, this is an art project and not associated with Hermès.

And everyone in that channel, as you heard, was able to message him directly at any time. He was in constant communication with these people.

Ashley, would you go to the next Discord slide.

You saw that that he ran polls of his MetaBirkins members to ask them what they wanted him to do next with his MetaBirkins art project.

And you also heard from Mr. Rothschild that when he became aware of articles, he or his publicist, Ken Loo, became aware of articles that mistakenly attributed MetaBirkins to Hermès, they reached out to correct them.

Ashley, would you show that bit of Mr. Rothschild's testimony.

I want you to just ask yourself, why would

1 Mr. Rothschild have wanted to mislead people into thinking that
2 MetaBirkins came from Hermès?

3 It would be so he could make as much money as he
4 possibly could off of the sales of them, right?

5 But we know that he didn't do that.

6 He sold the MetaBirkins for just .1 ETH, the
7 equivalent of about \$450 at the time.

8 Now, as you heard, there was a lot of excitement about
9 the MetaBirkins NFTs when they were released. He'd been
10 building that excitement up by previewing them for weeks on
11 Discord on his social media pages on the website.

12 It's pretty clear that demand was high enough at that
13 point that he could have charged a lot more money than what he
14 did for those 100 MetaBirkins NFTs, but he didn't do that.

15 He didn't do that because that was part of his
16 artistic experiment, as you heard him explain, and as he
17 explained in the Yahoo Finance interview that you've seen clips
18 of, because he wanted to see what kind of value people would
19 ascribe to these two dimensional pictures of imaginary Birkin
20 bags once they were released out into the world.

21 Now, you have heard Mr. Warshavsky, my opposing
22 counsel, go on about the fact that MetaBirkins NFTs were
23 attached to the shrouded object for less than 24 hours when
24 they were being minted.

25 All right. I am not sure what he's getting at here.

1 If this were a case where the artworks were not previewed and
2 customers had no idea what they were buying, other than a
3 shrouded image called MetaBirkins, then maybe what he was
4 saying to you would be relevant.

5 But that's not what happened here.

6 Here, it is undisputed that Mr. Rothschild previewed
7 the MetaBirkins artworks before the NFTs were released.

8 Everybody who bought a MetaBirkins NFT knew that they
9 were going to get one of the 100 MetaBirkins artwork. This
10 wasn't a secret. Even Mr. Martin, Hermès representative,
11 admitted this in his testimony.

12 If anything is clear in this case, it is that
13 Mr. Rothschild never intentionally tried to mislead anyone into
14 believing that MetaBirkins came from Hermès. He wanted to
15 conduct an artistic experiment, and he wanted the credit for
16 his own artwork.

17 After I sit down, Mr. Harris is going to talk with you
18 in more detail about the evidence of confusion in this case.
19 What I will say about it now is that the evidence that
20 potential consumers were likely to be confused into thinking
21 that MetaBirkins came from Hermès is weak. You just heard
22 Dr. Neal testify about how weak it is. It doesn't come close
23 to clearing the high bar of the First Amendment.

24 Now, there will always be people who are confused
25 about things, whether in a survey that you are giving them or

1 on social media. But it is clear from Hermès' own survey
2 evidence that it is not exceptionally likely that potential
3 consumers, people who spend thousands of dollars on handbags or
4 NFTs, would be confused about whether MetaBirkins comes from
5 Hermès.

6 It is not surprising that the evidence of confusion is
7 so weak, because Mr. Rothschild, as you have seen, made clear
8 wherever he could that he created MetaBirkins. He is the
9 artist. He created them. And he's proud of it.

10 He has a constitutional right to create his
11 MetaBirkins artwork, he has a constitutional right to promote
12 them, and he has a constitutional right to sell and make money
13 from his MetaBirkins artwork, so long as he doesn't explicitly
14 mislead people into believing that it came from Hermès and not
15 him. That is the bottom line in this case.

16 But our Constitution doesn't enforce itself. Our
17 Constitution gives you, as members of this jury, the power to
18 enforce it. The rights that it guarantees, like the freedom of
19 speech and artistic expression that are protected by the First
20 Amendment, those rights are only guaranteed if we all uphold
21 them in moments like this.

22 I am confident that when you go back to the
23 deliberation room and you look at the totality of the evidence
24 in this case, you will see that the First Amendment bars
25 liability on all of Hermès' claims in this case.

1 Thank you so much for your time and attention.

2 I will turn this over to Mr. Harris now to discuss
3 with you confusion and Hermès' claims of dilution and
4 cybersquatting.

5 MR. HARRIS: Mr. Warshavsky, would you mind if I
6 borrowed one of those bags?

7 MR. WARSHAVSKY: Not at all.

8 MR. HARRIS: I will take the black one. Thank you.

9 MR. WARSHAVSKY: You got it.

10 MR. HARRIS: Good afternoon.

11 Let let's talk about confusion. This is a Birkin bag.
12 It takes 18 to 24 hours to make. It is a real handbag that can
13 hold real things.

14 This is Exhibit 506 in evidence. These are
15 MetaBirkins you can photocopy. They're two dimensional images.
16 You can cut one out and hold it up like this.

17 It is an art project. This is one of the MetaBirkins
18 that was not actually made. It is the one with the banana.
19 That's not a real banana. You can't eat it. You can't put it
20 in a MetaBirkin, and you can't even print it out 3D.

21 What you can do with a MetaBirkin, if you wish, is
22 print it out with your photocopier, put it in your pocket like
23 this, or you can look at it on your computer screen.

24 You heard Mr. Rothschild testify they are a 2D image.

25 Now, this is the example Mr. Rothschild used.

1 He took a water bottle. This is a 3D object. You can
2 take a 2D picture of it, you take a 2D picture of it, it's a 2D
3 image, and then you can photocopy it. That's what you can do
4 with a MetaBirkin. There is no confusion, and there's no
5 likelihood that a substantial number of consumers would be
6 confused.

7 (Continued on next page)

1 MR. HARRIS: Hermès spent a lot of money to hire three
2 expensive experts to come in here and testify. You heard from
3 Dr. Kominers. Smart fellow. Well paid, to say the least. But
4 you may find, you may find, that Dr. Kominers did not actually
5 say anything that matters to the claims in this case.

6 He had two main points.

7 The first had to do with segmenting the NFT mark.

8 Ashley, thank you.

9 And Dr. Kominers testified – my colleague tried to
10 draw this on the Elmo. Testified that the NFT market has
11 different submarkets: tickets, music, art only, digital brand,
12 other.

13 And if you go to the second slide, Dr. Kominers said
14 if you have an NFT that's attached to a painting, that's art
15 only. If you have an NFT that's attached to a painting and it
16 offers some more functionality, like the ability to get on a
17 list for a future project, now it's a digital brand.

18 Now, we don't disagree, no one here disagrees that
19 MetaBirkins offered an image plus certain other things, like
20 what I just said, the ability to get on a list for a future
21 project. Just don't know what that is relevant to. You can
22 buy a Timex watch for maybe \$20. It will tell the time. You
23 can buy a simple alarm, gets you up in the morning. Or you can
24 buy a Timex watch with an alarm. Those are both watches. Now,
25 perhaps Dr. Kominers would call the watch with the alarm not

1 watch only. Okay.

2 Dr. Kominers showed you a picture of an NFT frog.
3 That's the one over here on the left of the screen. We found
4 some other pictures of frogs on the internet. A frog with a
5 crown is still a frog, maybe not frog only.

6 So what Dr. Kominers does is argue that having utility
7 converts something into being a digital brand. The things that
8 doctor -- the things that Dr. Kominers identifies are the
9 things that artists have been doing for ages, which people have
10 testified to here: putting buyers on the list for future
11 projects, having a community, trying to promote their work and
12 promote the discussion.

13 Mr. Moulin, you may recall, one of Hermès's witness,
14 came in here to testify and brought a Power Point he created on
15 NFTs. This is one of the things he wrote. This is his slide:
16 NFTs allow for the establishment of a new more ethical and
17 decentralized relationship between owners of luxury items and
18 brands or between artists and their customers. Mr. Moulin flew
19 in from France for that. Or between item artists and their
20 customers.

21 So let's get back to Dr. Kominers. Dr. Kominers did
22 some math and showed a bunch of charts. Used his math to argue
23 that MetaBirkins are more akin to a digital brand than art
24 only. Again, I don't know that that matters to any of the
25 claims in the case. But even if it did, let's look at Dr.

1 Kominers's math and his charts.

2 Please put up slide 6, Ashley.

3 This is Dr. Kominers' market analysis chart. And if
4 you see up at the top, NeoTokyo Citizen, which is 111,000,
5 isn't shown. It's not shown because the number is too high.
6 It's kind of like the Russian judge and the figure skating to
7 throw out the data you don't like. And so we did this chart
8 with the full data. And when you see it with the full data,
9 MetaBirkins is much closer to the other group than the NeoTokyo
10 Citizens. Again, I'm not 100 percent what the chart is trying
11 to show, but that's the actual chart.

12 By the way, also you heard – and Mr. Warshavsky said
13 in his own closing today – that these things were sold in
14 Ether. And the price of Ether fluctuates against dollars. Dr.
15 Kominers did his chart in dollars. So we don't even know if it
16 accounts for the fluctuations in the price of Ether over time.
17 That's what the chart looks like.

18 So he did another chart. Again, I'm not 100 percent
19 sure what this chart is supposed to show, but I do know one
20 thing: Dr. Kominers threw out Mobland and threw out
21 X-Consoles, didn't put them on his chart. Russian judge.

22 Let's see what the chart looks like with that data.

23 With that data, MetaBirkins, down towards the bottom
24 of that chart.

25 And by the way, also on Dr. Kominers' chart he put

1 MintDisc above -- he put MetaBirkins above MintDisc. If you
2 look at the data, MintDisc is above MetaBirkins, not that it
3 matters. All right. That's the actual chart.

4 So let's take a look at another chart Dr. Kominers
5 showed you. This is a chart that Hermès's counsel showed you
6 in closing this morning. That's the chart Dr. Kominers showed
7 you.

8 Now, what's interesting about this chart -- Ashley, if
9 you could -- see that red box? We printed this chart out. We
10 printed this chart out on eight and a half by 11 paper and
11 measured it last night. That red box -- the whole chart is
12 nine and a half inches. That red box is eight inches. That's
13 less than one month. It's 23 days, maybe it's 24. December 3
14 to December 26. That's eight inches.

15 The next part, Ashley.

16 That little part now in blue or black, that's 11
17 months. That's 1.5 inches. Again, the chart is in dollars.
18 Chart doesn't account -- we know -- Mr. Warshavsky just said
19 that the price of Ether has declined from about 4500 to
20 about -- at the time of the minting to about 1600 yesterday,
21 when he looked on the internet. We know Ether fluctuated. We
22 know this stuff was sold in Ether.

23 This chart is in dollars. It's no effort that I'm
24 aware to account for changes in the price of Ether. And then
25 this time scale was used to create whatever impression the

1 intent was.

2 And finally, Dr. Kominers put up this summary chart,
3 right. This chart Dr. Kominers was using to compare
4 MetaBirkins to the things you see on this page. But there's
5 something really interesting about the things you see on this
6 page. He put back in all the data he had excluded when he was
7 the Russian judge. NeoTokyo, that wasn't on his other chart.
8 It got excluded. Mobland, that wasn't on his other chart. It
9 got excluded. X-Console wasn't on his other chart, that got
10 excluded. But this chart, they included.

11 Now, what's left? MetaBirkins, a project that
12 involves Samsung and Sotheby's, a project that involves Nike
13 and a company Nike bought, and a project that involves
14 apparently Google. That's what's left. That's Dr. Kominers.

15 Now, there are two types of groups of consumers who
16 could be potentially confused in this case, right. And there's
17 potential confusions by handbag consumers and there's potential
18 confusion by NFT consumers. You heard a lot of testimony on it
19 this morning from Dr. Neal, not going to repeat, right.

20 But quickly, Dr. Isaacson conducted a survey aimed at
21 confusion among purchase of handbags. We heard that testimony.
22 And he found there was only 3.6 percent, percentage that was
23 too low to support a claim of confusion.

24 Can you put that transcript up?

25 This is from -- I can't see because of menu, but it's

1 transcript page, I think, 777. Sorry, just can't see it on my
2 screen.

3 He was asked: Have you ever formed an opinion -- this
4 is Dr. Isaacson was asked: Have you ever formed an opinion
5 about whether or not that 3.6 percent number from the handbags
6 survey reflected confusion amongst handbag purchasers?

7 Answer: I have expressed an opinion in this matter on
8 that 3.6 percent.

9 And what is that opinion, sir?

10 That number is below the number that would typically
11 be interpreted as indicating likelihood of confusion, 3.6
12 percent.

13 That's Dr. Isaacson's testimony.

14 Now, what's interesting is Dr. Isaacson didn't rely at
15 all on this number for his conclusions, he just tossed it out.
16 Russian judge.

17 And so can we put this back there?

18 There's no case here for confusion among handbag
19 consumers. Not a case. And you heard Dr. Neal talk about that
20 this morning, and you'll hear the judge.

21 So what does that leave us? Potential confusion by
22 purchasers of NFTs.

23 I want to get this very correct. The issue is whether
24 Mr. Rothschild's use of the Birkin name and/or the handbag's
25 distinct visual appearance is likely to confuse potential

1 consumers into thinking that the MetaBirkin NFTs are made and
2 sold or otherwise connected with, associated with, sponsored by
3 or approved by Hermès. And then, in determining this,
4 determining whether consumers are likely to be confused, you
5 may draw on your own common experience. You should take into
6 consideration the following factors.

7 I was reading that from the instructions.

8 Now, you heard Mr. Warshavsky go through these factors
9 at length. Factors are, of course, not the ultimate question
10 you are being asked to decide. The ultimate question you are
11 being asked to decide is whether, on balance, a likelihood of
12 confusion exists. That was a partial sentence, but you'll get
13 the whole sentence. Reading from the instructions.

14 So the factors are on a checklist; two factors for
15 Hermès, four factors for Rothschild, right. The question is,
16 on balance, whether a likelihood of confusion exists.

17 Now, one of the factors as to whether there's any
18 actual confusion by any actual purchasers of the bag. And we
19 would submit that this factor deserves substantial -- there's
20 no evidence in this case that any actual purchaser of an actual
21 MetaBirkin was confused. No purchaser, no evidence that any
22 purchaser of a MetaBirkin reached out to Mason Rothschild and
23 Discord or through the MetaBirkin's web page or anywhere else,
24 upset, angry, asking for their money back, saying, Hey, where's
25 my Birkin bag? There's simply none of that. And why would

1 there be? Because another factor on confusion is good faith,
2 especially intent. And this was discussed at length by
3 Mr. Millsaps. I'm not going to repeat it here.

4 But Mason Rothschild took every opportunity to
5 announce himself as the creator of the project, over 25,000
6 people on Discord he was speaking to. He was on Instagram
7 publicly, he was on Twitter, he was on the MetaBirkins website.
8 He never, ever publicly claimed once to be associated with
9 Hermès. The most he ever did was send some private text to
10 friends saying he was hoping to collaborate with Hermès, which
11 never happened. And Hermès belittles those attempts, because
12 they say, We don't know who Clement Quan is, or maybe you don't
13 really know the person at *Vogue*, or maybe you don't really have
14 a relationship with Sotheby's. They belittle the attempts.
15 Whatever. That's the only -- he did try. But the point is
16 those were private. They were never -- those are in private
17 texts.

18 In public, the only evidence is that Mason Rothschild
19 is proud of what he did and took credit for it. And when
20 Hermès complained and sent a cease and desist letter,
21 Mr. Rothschild put up a disclaimer on the website which you've
22 already seen. He and his publicist, Ken Loo, reach out to make
23 corrections, which you've heard. Why? Because he was proud of
24 his project and wanted credit for it. He wanted -- he wanted
25 to make some money from it, too. Hermès belittles that.

1 Something improper about making money. Like it's okay to spend
2 18 hours having a craftsman make a fancy handbag and sell
3 that -- those products for \$100 million a year just in the U.S.
4 alone, but it's not okay to make a MetaBirkin art project and
5 make money from that.

6 All right. So against this, what is the evidence of
7 likelihood of confusion? What evidence does Hermès offer?
8 Well, offers some questions from journalists. Questions from
9 journalists are not evidence of consumer confusion by potential
10 NFT purchasers. Journalists are paid to ask questions. That's
11 their job. They're not a good proxy for people of \$2500 or
12 more to spend for expensive NFTs or have a crypto wallet who
13 are interested in potentially buying a MetaBirkins.

14 And then they have some articles, they showed you some
15 articles; we saw them again today, right? Well, the articles
16 were corrected again. They are not evidence of confusion by
17 consumers. Maybe some evidence of some confusion by
18 journalists, right, which is corrected, right, which is all
19 evidence of Mason Rothschild's desire to take credit, right.

20 So we've got that. We've got a few newspaper articles
21 which are corrected. We've got a few journalist inquiries,
22 that's their job.

23 So what have we got left on confusion?

24 Well, we got the testimony of Dr. Isaacson, based on
25 his -- not the handbag people, those people are gone. We've

1 got the testimony of Dr. Isaacson based on his survey of
2 potential NFT purchasers. Dr. Neal talked about this survey at
3 length this morning and I am going to hit this very quickly,
4 okay.

5 But here's something interesting: The survey is based
6 on individuals who said in response to an online survey that
7 they would consider buying a \$2500 NFT in the next 12 months.
8 There's no work done by Dr. Isaacson to determine if any of
9 those folks actually bought an NFT for \$2500 or any other price
10 in the next 12 months. There's no work done by Dr. Isaacson to
11 check whether they ever bought an NFT. He has no knowledge if
12 they had a crypto wallet, if they owned any Ether. There's no
13 questions about whether these folks follow NFTs on Discord or
14 anywhere else.

15 What does he have? There's an online survey for folks
16 who say this is something they consider and they are willing to
17 do this in return for about 10 to 12 dollars in gift cards.
18 Since we've been talking about Starbucks this morning, that's
19 probably enough to buy about two cups of coffee at Starbucks.

20 And you may find that is not a representative sample
21 of folks who might mint a MetaBirkin NFT using a crypto wallet
22 paying in Ether. And that's important for two reasons:

23 First, you may find Dr. Isaacson didn't sample the
24 right group to begin with. Second, another factor you may
25 consider for likelihood of confusion is the sophistication of

1 the consumer. Because folks paying \$2500 for an NFT artwork,
2 paying a lot of money for anything, for that matter, are likely
3 to be going to pay attention, right, going to pay more
4 attention to buying a \$2500 item than if you're buying
5 something for a buck 50 off of the shelf at the Walmart.
6 That's probably right.

7 Then you heard Dr. Neal's testimony which I'm not
8 going to repeat here, that, well, Dr. Isaacson asked the right
9 question to weed out folks with this issue over feedback issue.
10 Dr. Isaacson then ignored the answer to his own question. Why
11 would Dr. Isaacson ignore the answer to his own question?
12 Didn't like the data. Russian judge. Just ignore it.

13 The combined effect of these flaws was to overstate
14 the amount of confusion from 18 percent or so to something
15 below ten percent. By the way, survey is just one factor,
16 right? But that is, that survey properly looked at is evidence
17 of a lack of confusion. The actual confusion was below ten
18 percent. And you heard Dr. Neal testify that below 15 percent,
19 15 percent, not ten percent, is generally considered not
20 sufficient to find confusion. Again, just one factor, and
21 that's assuming Dr. Isaacson even was surveying the right
22 folks.

23 So we believe -- not we believe, you may find there is
24 no likelihood of confusion in this case. Even if this were an
25 ordinary trademark case, without the First Amendment overlay,

1 given everything we have just discussed, the lack of any actual
2 confusion by any actual purchasers.

3 Mr. Rothschild's good faith and repeated efforts to
4 take credit and correct the record; the sophistication of the
5 purchasers, these are people spending a lot of money who need
6 to have a crypto wallet to do this; and all the issues Dr. Neal
7 discussed with Dr. Isaacson's survey. So there is no
8 confusion. Really, what more do we need than this?

9 Next issue is dilution, separate claim. In order to
10 prevail, Hermès must prove the Birkin mark is famous and was
11 famous before Mr. Rothschild first sold any of the MetaBirkin
12 NFTs. We don't dispute -- we don't dispute that the Birkin
13 mark is iconic among the wealthy. It is. That is different
14 than famous. Famous, and you will read, "famous" means widely
15 recognized by the general consuming public as designated Hermès
16 as the source of goods bearing the mark. General consuming
17 public, you may find, is not folks on Park Avenue carrying
18 Birkin bags; it's the general consuming public of the United
19 States, meaning folks all over the country, all income groups,
20 both men and women.

21 Ford Mustang is famous, widely recognized by the
22 general consuming public as coming from Ford. Coca-Cola is
23 famous, Nike is famous, Walmart is famous. There's plenty of
24 evidence in this case, which we don't dispute, of the Birkin
25 bag being featured in high-end fashion magazines like *Vogue* and

1 *Town & Country*, and being legendary among consumers of \$12,000
2 handbags. That is very different than evidence of the Birkin
3 bag being widely recognized by the general consuming public of
4 this country, like Coca-Cola.

5 Counsel for Hermès just stood up here not -- maybe not
6 half an hour ago, maybe a little more, and said Hermès only has
7 32 stores in the United States total.

8 The second thing Hermès would need to prove on this
9 dilution thing is that Mr. Rothschild's use of the MetaBirkins
10 name and the images associated with it are likely to dilute the
11 distinctiveness of the Birkin mark; that is, not that there is
12 an association, but that the association dilutes the
13 distinctiveness of the mark, that because of Mr. -- because of
14 Mr. Rothschild's MetaBirkins, the Birkin mark has less power in
15 identifying Birkin bags to the wealthy consumers who covet them
16 and can afford them.

17 Really?

18 Does that sound right to you?

19 As counsel showed you pictures of bees, all right.
20 Mr. Rothschild is not responsible for the other bees. He's not
21 responsible for somebody who's making a stone sculpture of the
22 Birkin bag. He's not responsible for being singing about the
23 Birkin bag in a rap song. Mr. Rothschild owns his conduct and
24 is responsible for his conduct.

25 Come to Hermès's third claim in this case, which is

1 for cybersquatting. This isn't a case where Hermès owns
2 hermès.com and someone goes out and squats on hermès.org,
3 demands a ransom. Judge Rakoff will tell you that bad faith is
4 one of the elements of cybersquatting that Hermès must prove.
5 There's no basis in this case to find Mr. Rothschild squatted
6 or squatted in bad faith on any web domain.

7 The uncontradicted evidence is Mr. Rothschild used
8 metabirkins.com only for the MetaBirkins project, and he never
9 attempted to sell the metabirkins.com site to anyone. There's
10 no evidence he attempted to hold the metabirkins.com website
11 name hostage or he attempted to divert customers from Hermès's
12 own website. The evidence is that Mr. Rothschild only used
13 metabirkins.com to sell the MetaBirkins he created. In so
14 doing, he acted in good faith. As my colleague covered, from
15 the start metabirkins.com website informed consumers that Mason
16 Rothschild was the creator. And after Hermès sent a cease and
17 desist, Mr. Rothschild put up a disclaimer. There's no claim
18 here for cybersquatting.

19 So we come to damages. It's our part of the case for
20 us. We hope you won't get to damages. We're asking you not to
21 get to damages. We're asking you to find Mr. Rothschild not
22 liable for trademark infringement, not liable for dilution or
23 cybersquatting, and to find his activities protected by the
24 First Amendment of the Constitution.

25 THE COURT: Thank you very much.

1 I'm sorry, were you --

2 MR. HARRIS: I have maybe -- I don't have a lot left.

3 THE COURT: No, no, go ahead. You have ten minutes
4 left.

5 MR. HARRIS: I am going to do --

6 THE COURT: I just misunderstood.

7 MR. HARRIS: Thank you, your Honor.

8 Don't want to miss the grand finale. Sorry.

9 But when you come to damages, there's the testimony of
10 Mr. Chavez, the head of Hermès in the United States.

11 Mr. Chavez testified that Birkin sales increased in 2021 and
12 '22. And he testified, here is the bottom Q: Are you aware of
13 loss of sales revenue in North America because of the
14 MetaBirkin?

15 No, I am not.

16 So Hermès, which has no damages, is asking instead for
17 the profits made by Mr. Rothschild. You heard he minted 100
18 Birkin bags at 1.1 Ether each and got a small piece of resales.
19 You heard he got paid in Ether, which the testimony is it's now
20 gone down in price. You heard that in total, the minting fees
21 amounted to about \$45,000, and about \$67,000 for resales.

22 Mr. Warshavsky, if you could do me a favor and put up
23 the chart you used from your expert, the damage chart. I think
24 it's the last chart you used.

25 You'll see the chart is from Dr. Mentzer. The minting

1 revenue is about \$45,000. That's converted from the Ether; the
2 Ether are worth less now. The royalties are about 69,000. We
3 talked about that. Artists, when they do NFTs, are able to get
4 a share of royalties going forward. That would be
5 Mr. Rothschild's share, it's about 17 and a half Ether,
6 \$69,000. Again, the price has gone down.

7 Then he comes to MetaBirkin NFT transfers. And what
8 is that? Well, that is that Mr. Mentzer took the position that
9 because Mr. Rothschild kept three MetaBirkins out of the first
10 100 that were minted, that the damage there is \$120,000 based
11 on the highest price of MetaBirkin ever traded for. I don't
12 really understand. But the testimony is that Mr. Rothschild
13 gave away two of those MetaBirkins, and he only has one.
14 There's no evidence in this case that he intends to sell it or
15 that he could sell it for \$40,000 right now.

16 So that's the damages. I'd ask you to disregard
17 Mr. Mentzer's \$120,000, and to bear in mind the price of Ether
18 has gone down.

19 Now, again, there was no harm to -- of course, we're
20 going to ask you not to find liability and no damages.

21 Again, there was no harm to Hermès, so why? You may
22 find Hermès didn't like Mr. Rothschild's art; that Hermès
23 judged Mason Rothschild and his art and found him wanton.
24 Maybe that Hermès 150-year-old French fashion house thinks it's
25 better than Mason Rothschild, the self-made artist with no

1 formal art school training. And upset that a 27-year-old -- now
2 28-year-old -- from L.A., who Hermès had never heard of, did
3 this.

4 We heard some interesting things in this case that
5 speak to Hermès's attitude.

6 Hermès's counsel showed you in opening and then showed
7 you again today and showed Mr. Rothschild a lot of texts, but
8 didn't ask for a lot of explanation, which is his right. We
9 provided that explanation. You might remember the -- was shown
10 today in closing, the Future tech, the Future posting. That's
11 a post that Future made about the MetaBirkins, rap star. And
12 Mr. Rothschild put on -- can you put that up, Ashley? And
13 Mr. Rothschild put up on that -- okay, I'll just keep going.
14 Don't worry about it. I'll keep going. They'll remember.

15 Mr. Rothschild -- there it is -- put up on it
16 MetaBirkins2Pluto. And Dr. Kominers got up there and said,
17 Well, that means the price going to the moon. Didn't bother to
18 find out that Mr. Rothschild knows Future, and that that is
19 Future's nickname. It's an interesting thing that a man named
20 Future has a nickname. Okay. Another nickname.

21 All right. So then it happens again. They put up --
22 if you could throw up, please, Ashley, Exhibit -- the one I
23 handed to you before, it's Exhibit 313.

24 Mr. Rothschild, on direct, was examined by this,
25 leaving the impression that when it was minted, it said "secure

1 the bag." We had to bring out on cross, you can very clearly
2 see it says "press the button below to mint your MetaBirkin
3 now." So that's just a couple of examples, all right.

4 Now, Mr. Martin, the general counsel of Oliver Mezz,
5 who's been sitting here the whole trial, testified on direct,
6 questions by his lawyer, that Hermès had no contact, no
7 contact, his words, with Mason Rothschild after sending the
8 cease and desist.

9 On cross, Mr. Martin had to correct that. Because, in
10 fact, Mason Rothschild was respectful and his attorneys reached
11 out to Hermès's attorneys right away. And then Mr. Rothschild
12 put a disclaimer on his website. And he went on Discord and
13 told all those tens of thousands of people that he wasn't
14 affiliated with Hermès in any way, shape or form; this was his
15 project. And then Hermès sued Mr. Rothschild anyway. And then
16 even though Hermès could have sent the complaint to his lawyers
17 with whom they were in contact, Hermès chose to serve
18 Mr. Rothschild at his store showing pictures to his customers.
19 That's a lack of respect.

20 Mason Rothschild came from a good family, but he came
21 from nothing. He made himself. Designs now for Formula I. He
22 did not -- he owns a boutique in Los Angeles with his fiancé.
23 He made himself an artist. Mason Rothschild wasn't given
24 anything. He started working at 16. You saw our testimony
25 about how hard he's worked.

1 Hermès wants more than what they are entitled to here.
2 They want more than what the law gives them. The law gives
3 Hermès the ability in certain circumstances to enforce their
4 trademark in the commercial market and to prevent consumer
5 confusion.

6 Here, there is no confusion. There is no dilution.
7 There is no cybersquatting. There is no valid claim. And
8 Hermès still wants more. They want control over how Mason
9 Rothschild makes a point or creates pictures. And that is
10 protected by the First Amendment of our Constitution; that is
11 protected by you. Thank you.

12 THE COURT: Thank you very much.

13 Ladies and gentlemen, so we'll give you your lunch
14 break now and we'll get some medicine for our court reporter.
15 And we'll see you at 10 after 2.

16 (Jury not present)

17 THE COURT: Just work out over the lunch break, as I
18 indicated, any remaining problems on the index of the exhibits
19 and the exhibits themselves. But if there still is an issue,
20 I'll take it up when we get back at 10 after 2.

21 See you then.

22 (Luncheon recess)

23 (Continued on next page)
24
25

AFTERNOON SESSION

(2:15 p.m.)

THE COURT: Please be seated.

Everything worked out with the exhibits?

MR. WARSHAVSKY: Yes, your Honor.

THE COURT: When the jury retires to deliberate, give the exhibits and the index to my courtroom deputy, and she'll take them into the jury room.

MR. HARRIS: Your Honor?

THE COURT: Yes.

MR. HARRIS: May I ask for a similar thing as we said before with respect to Mr. Rothschild?

THE COURT: Yes.

MR. HARRIS: Thank you.

THE COURT: I can't say he's late.

MR. HARRIS: He is ill, your Honor.

THE COURT: I am not going to say that. I am going to say he's excused with the consent of all concerned.

MR. HARRIS: Okay.

(Jury present)

THE COURT: Please be seated. Ladies and gentlemen, you each have a copy of my instructions of what you. We are going to read them together now.

You can take them with you into the jury room. And you should discard the preliminary instruction that I gave you

earlier, because this replaces that.

I should also mention that with the consent of all parties, Mr. Rothschild was excused so he is not here in the courtroom, but he, of course, will be back.

So okay.

Let's turn to page 2, the table of contents. You will see that my instructions are divided into four parts.

There are first general instructions. Those apply not just to this case but all civil cases.

Then there is a heading liability. That's about the specific charges in this case.

And then if you do find there is any liability, then you would then turn to damages. That's the lawyers' words for money.

And, finally, there is some concluding instruction about how you fill out your verdict form.

So let's turn to the first instruction on page 3.

We are now approaching the most important part of this case, your deliberations. You have heard all the evidence in the case, as well as the final arguments of the lawyers for the parties. Before you retire to deliberate, it is my duty to instruct you to you as to the law that will govern your deliberations. These are the final and binding instructions, which entirely replace the preliminary instruction I gave you at start of the case, which you should now discard.

1 Regardless of any opinion that you may have as to what
2 the law may on be or ought to be, it is your sworn duty to
3 follow the law as I give it to you. Also, if any attorney or
4 other person has stated a legal principle different from any
5 that I state to you in my instructions, it is my instructions
6 that you must follow.

7 Because my instructions cover many points, I have
8 provided each of you with a copy of them, not only so that you
9 can follow them as I read them to you now, but also so that you
10 can have them with you for reference throughout your
11 deliberations. In listening to them now and reviewing them
12 later, you should not single out any particular instruction as
13 alone stating the law, but you should instead consider my
14 instructions as a whole.

15 Your duty is to decide the fact issues in the case and
16 arrive, if you can, at a verdict. You, the members of the
17 jury, are the sole and exclusive judges of the facts. You pass
18 upon the weight of the evidence; you determine the credibility
19 of the witnesses; you resolve such conflicts as there may be in
20 the testimony; and you draw whatever reasonable inferences you
21 decide to draw from the facts as you determine them.

22 In determining the facts, you must rely upon your own
23 recollection of the evidence. To aid your recollection, we
24 will send you the exhibits at the start of your deliberations,
25 together with an index to help you find what you want. If you

1 need to review particular items of testimony, we can also
2 arrange to provide them to you in transcript or readback form.

3 Please remember that none of what the lawyers have
4 said in their opening statements, in their closing arguments,
5 in their objections, or in their questions, is evidence. Nor
6 is anything I may have said evidence. The evidence before you
7 consists of just three things: The testimony given by
8 witnesses that was received in evidence, the exhibits that were
9 received in evidence, and any stipulation of the parties as to
10 matters in evidence.

11 Testimony consists of the answers that were given by
12 the witnesses to the questions that were permitted to be asked
13 here in court. Please remember that questions, although they
14 may provide the context for answers, are not themselves
15 evidence; only answers are evidence, and you should therefore
16 disregard any question to which I sustained an objection.
17 Also, you may not consider any answer that I directed you to
18 disregard or that I directed be stricken from the record.
19 Likewise, you may not consider anything you heard about the
20 contents of any exhibit that was not received in evidence.

21 More generally, you should be careful not to speculate
22 about matters not in evidence. Your focus should be solely on
23 the evidence that was presented here in court.

24 It is the duty of the attorney for each of side of a
25 case to object when the other side offers testimony or other

1 evidence that the attorney believes is not properly admissible.
2 Counsel also have the right and duty to ask the Court to make
3 rulings of law and to request conferences out of the hearing of
4 the jury. All such questions of law must be decided by me.
5 You should not show any prejudice against any attorney or party
6 because the attorney objected to the admissibility of evidence,
7 asked for a conference out of the hearing of the jury, or asked
8 me for a ruling on the law.

9 I also ask you to draw no inference from any rulings
10 or from the fact that on occasion I asked questions of certain
11 witnesses. My rulings were no more than applications of the
12 law, and my questions were only intended for clarification or
13 to expedite matters. You should understand that I have no
14 opinion as to the verdict you should render in this case. You
15 are to perform your duty of deciding the facts without bias or
16 prejudice or sympathy or hostility to as to any party, for all
17 parties are equal under the law. You are to perform your final
18 duty in an attitude of complete fairness and impartiality. You
19 are not to be swayed by rhetoric or emotional appeals. It must
20 being clear to you that if you were to let extraneous
21 considerations interfere with your thinking, there would be a
22 risk that you would not arrive at a true and just verdict. So
23 do not be guided by anything except clear thinking and calm
24 analysis of the evidence.

25 As you know, this is a civil case. In a civil case, a

1 party who is making a claim against another party has what we
2 call the burden of proof, which is the burden of establishing
3 each of the essential elements of that claim. Here, the
4 plaintiffs, Hermès International Inc., and Hermès of Paris
5 Inc., which I will refer to collectively as Hermès, has
6 asserted various claims against Mason Rothschild, and therefore
7 has the burden of proof as to those claims.

8 I will describe the essential elements of Hermès'
9 claims shortly, but for now, keep in mind that for any given
10 claim you are considering, Hermès must prove each of the
11 essential elements of that claim by a preponderance of the
12 credible evidence. The credible evidence means such evidence
13 that you find worthy of belief. To establish an element after
14 a claim by a preponderance of the credible evidence means to
15 prove that that element is more likely true than not true.

16 When assessing whether a party has met its burden of
17 proof or failed to do so, the question is not which party
18 called the greater number of witnesses or how much time one
19 party or another spent during the trial. The focus must always
20 be on the quality of the evidence: Its persuasiveness in
21 convincing you of its truth.

22 In deciding whether a party meets its burden of proof,
23 you may consider both direct evidence and circumstantial
24 evidence.

25 Direct evidence is evidence that proves a fact

1 directly. For example, where a witness testifies to what he or
2 she saw, heard, or observed, that is called direct evidence.

3 Circumstantial evidence is evidence that tends to
4 prove a fact by proof of other facts. To give a simple
5 example, suppose that when you came into the courthouse today
6 the sun was shining and it was a nice day, but the courtroom
7 blinds were drawn and you could not look outside. Later, as
8 you were sitting here, someone walked in with a dripping wet
9 umbrella and, soon after, somebody else walked in with a
10 dripping wet raincoat. Now, on our assumed facts, you cannot
11 look outside of the courtroom and you cannot say whether it is
12 raining. So you have no direct evidence of that fact. But on
13 the examination of the facts about the umbrella and the
14 raincoat, it would be reasonable for you to infer that it had
15 begun raining.

16 That is all there is to circumstantial evidence.
17 Using your reason and experience, you infer from established
18 facts the existence or the nonexistence of some other fact.
19 Please note, however, it is not a matter of speculation or
20 guess; it is a matter of logical inference.

21 The law makes no distinction between direct and
22 circumstantial evidence. Circumstantial evidence is of no less
23 value than direct evidence, and you may consider either or
24 both, and may give them such weight as you conclude is
25 warranted.

1 It must be clear to you by now that counsel for the
2 opposing parties are asking you to draw very different
3 conclusions about various factual issues in the case. An
4 important part of that decision will involve making judgments
5 about the testimony of the witnesses you have listened to and
6 observed. In making these judgments, you should carefully
7 scrutinize all of the testimony of each witness, the
8 circumstances under which each witness testified, and any other
9 matter in evidence that may help you to decide the truth and
10 the importance of each witness's testimony.

11 Your decision to believe or to not believe a witness
12 may depend on how that witness impressed you. How did the
13 witness appear to you? Was the witness candid, frank, and
14 forthright, or did the witness seem to be evasive or suspect in
15 some way? How did the way the witness testified on direct
16 examination compare with how the witness testified on
17 cross-examination? Was the witness consistent or
18 contradictory? Did the witness appear to know what he or she
19 was talking about? Did the witness strike you as someone who
20 was trying to report his or her knowledge accurately? These
21 are examples of the kinds of common-sense questions you should
22 ask yourselves in deciding whether a witness is or is not
23 truthful.

24 How much you choose to believe a witness may also be
25 influenced by the witness's bias. Does the witness have a

1 relationship with any of the parties that may affect how he or
2 she testified? Does the witness have some interest, incentive,
3 loyalty, or motive that might cause him or her to shade the
4 truth? Does the witness have some bias, prejudice, or motive
5 that might cause him or her to give you something other than a
6 completely accurate account of the facts he or she testified
7 to.

8 You should also consider whether the witness had an
9 opportunity to observe the facts he or she testified about, and
10 whether the witness's recollection of the facts stands up in
11 light of the other evidence in the case.

12 In other words, what you must try to do in deciding
13 credibility is to size up a person just as you would in any
14 important matter where you are trying to decide if a person is
15 truthful, straightforward, and accurate in his or her
16 recollection.

17 Some of the testimony before you is in the form of
18 videotaped deposition that was received in evidence. At
19 various times moreover, excerpts from the depositions of
20 several witnesses were read into evidence. A deposition is
21 simply a procedure where, prior to trial, the attorneys may
22 question a witness under oath before a court stenographer. You
23 may consider the testimony of a witness given at a disposition
24 according to the same standards you would use to evaluate the
25 testimony of a witness given live at trial.

1 In addition, one witness testified remotely by
2 videoconference. You should consider this testimony according
3 to the same standards you use to evaluate the testimony of the
4 witnesses who testified here in the courtroom.

5 The law permits parties to offer testimony from
6 witnesses who were not involved in the underlying events of the
7 case, but who by education or experience profess some expertise
8 in a specialized area of knowledge.

9 In this case, the expert witnesses who testified were
10 Dr. Kevin Mentzer, Dr. Scott Duke Kominers, and Dr. Bruce
11 Isaacson, called by the plaintiffs, and Dr. David Neal, called
12 by the defendant. Specialized testimony is presented to you on
13 the theory that someone who is learned in the field may be able
14 to assist you in understanding specialized aspects of the
15 evidence.

16 However, your role in judging credibility and
17 assessing weight applies just as much to these witnesses as to
18 other witnesses. When you consider the specialized opinions
19 that were received in evidence in this case, you may give them
20 as much or as little weight as you think they deserve. For
21 example, a specialized witness necessarily bases his or her
22 opinions, in part or in whole, on what that witness learned
23 from others, and you may conclude that the weight given the
24 witness's opinions may be affected by how accurate or
25 inaccurate that underlying information is. More generally, if

1 you find that the opinions of a specialized witness were not
2 based on sufficient data, education, or experience, or if you
3 should conclude that the trustworthiness or credibility of such
4 a witness is questionable, or if the opinion of the witness is
5 outweighed, in your judgment, by other evidence in the case,
6 then you may, if you wish, disregard the opinions of that
7 witness, entirely or in part.

8 On the other hand, if you find that a specialized
9 witness is credible, and that the witness's opinions are based
10 on sufficient data, education, and experience, and that the
11 other evidence does not give you reason to doubt the witness's
12 conclusions, you may, if you wish, rely on that witness's
13 opinions and give them whatever weight you deem appropriate.

14 With these general instructions in mind, let us now to
15 turn to the three claims in case that the plaintiff, Hermès,
16 brings against the defendant, Mason Rothschild:

17 First, a claim of trademark infringement;

18 Second, a claim of trademark dilution; and

19 Third, a claim of so-called cybersquatting.

20 I will shortly instruct you on each of the essential
21 elements that Hermès must prove, by a preponderance of the
22 evidence, to prevail on a given claim. This is known as
23 establishing liability on that claim.

24 In addition, however, even if you find the defendant
25 is liable on one or more of these claims, you must also

1 consider whether the legally protected right to artistic
2 expression nonetheless bars liability or not.

3 Before we turn to Hermès' claims, a brief word about
4 the trademark at issue. A trademark can be a word, name,
5 symbol, or design that indicates to consumers the company
6 associated with a product. Here, Hermès asserts trademark
7 infringement, trademark dilution and cybersquatting as to the
8 Birkin mark, which is a federally registered trademark
9 described at Plaintiffs' Exhibits 5 and 6, and that covers both
10 the Birkin and the handbag's distinct visual appearance. In
11 this case, it is undisputed that Mr. Rothschild marketed
12 certain NFTs under the heading MetaBirkins and that these NFTs
13 were associated with digital images of fur-covered Birkin bags.
14 Collectively, these NFTs and their associated images are here
15 referred to as MetaBirkins NFTs.

16 Hermès' first claim is trademark infringement. Hermès
17 asserts that Mr. Rothschild has infringed Hermès' Birkin mark
18 (which as described in instruction No. 10 includes both the
19 word Birkin and the Birkin bag's distinct visual appearance)
20 through the use of this mark in his MetaBirkins NFT project.
21 Specifically, Hermès contends that Mr. Rothschild's use of the
22 Birkin name and/or the handbag's distinct visual appearance is
23 likely to confuse potential consumers into thinking that the
24 MetaBirkins NFTs are made and sold or otherwise connected with,
25 associated with, sponsored by, or approved by Hermès.

1 In determining whether consumers are likely to be
2 confused, you may draw on your own common experience. You
3 should also take into account the following factors:

4 First, the strength of Hermès' Birkin trademark. A
5 mark's strength is measured by its tendency to identify the
6 products sold under the mark as associated with a particular
7 company and may depend on factors such as advertising, media
8 coverage of products bearing the mark, sales success, the
9 longevity and exclusivity of the mark's use, consumer studies
10 linking the mark to the company, and any other factor in
11 evidence that you find bears on the strength of the mark. The
12 stronger the mark, the more likely that similar uses by other
13 parties will cause confusion.

14 Second, the degree of similarity between Hermès'
15 Birkin mark and the MetaBirkins NFTs name and visual
16 appearance. In particular, you should consider what effect the
17 similarity or lack thereof has on consumers and whether any
18 similarity between the parties' mark is likely to cause
19 confusion among consumers.

20 Third, whether the MetaBirkins NFTs and Hermès
21 products compete for the same consumers.

22 Fourth, whether or not there is evidence that
23 consumers are actually confused about whether Hermès offers or
24 is associated with the MetaBirkins NFTs. While proof of actual
25 confusion is not necessary to prove trademark infringement and

1 it is enough for plaintiffs to show likelihood of confusion,
2 evidence of actual confusion can weigh in favor of there being
3 a likelihood of confusion. Conversely, the absence of evidence
4 of actual confusion can be evidence that confusion is unlikely.

5 Fifth, the degree of care and attention that an
6 ordinary consumer would use when encountering Hermès' Birkin
7 mark and the MetaBirkins NFTs. Generally, the more
8 sophisticated and careful the average consumer of a product is,
9 the less likely that that consumer will be confused about the
10 company or individual behind a similarly named product. Here,
11 given the high price of Birkin handbags, you should presume
12 that consumers of the Birkin handbags are more sophisticated
13 and deliberate than ordinary consumers.

14 Sixth, whether Hermès has shown that Mr. Rothschild
15 acted in bad faith. In this context, bad faith goes to whether
16 Mr. Rothschild used the MetaBirkins name and the visual
17 appearance of the underlying images with the intention that
18 consumers would believe that Hermès originated or endorsed the
19 MetaBirkins NFTs, or whether Mr. Rothschild chose to purposely
20 turn a blind eye to the likelihood that potential consumers
21 would be confused.

22 Seventh, the likelihood that Hermès had concrete and
23 realistic plans to produce and sell its own NFTs using the
24 Birkin mark, such that potential consumers would mistakenly
25 believe that the MetaBirkins NFT project represented Hermès'

1 entry into the NFT market.

2 In considering the factors I just described to you,
3 please keep in mind that no one factor or consideration is
4 conclusive, but each of these factors, as well as any other
5 factors you find relevant, should be weighed in light of the
6 total evidence presented at the trial to determine whether, on
7 balance, a likelihood of confusion exists. If Hermès has
8 proved that a likelihood of confusions exists, it has carried
9 its burden of proof on its infringement claim.

10 Hermès also asserts a claim for trademark dilution
11 under federal law. This claim does not require showing that
12 consumers are likely to be confused about the source of the
13 MetaBirkins NFTs. Instead, it requires showing that
14 Mr. Rothschild's use of the MetaBirkins name and the images
15 associated with it are likely to dilute the distinctiveness of
16 Hermès Birkin mark by eroding its distinctiveness in the minds
17 of the public.

18 To prove dilution under information law, Hermès must
19 show by a preponderance of the credible evidence that: (1) the
20 Birkin mark is famous; (2) the Birkin mark became famous before
21 Mr. Rothschild first sold any of the MetaBirkins NFTs; and (3)
22 Mr. Rothschild' use of the MetaBirkins name and the images
23 associated with it are likely to dilute the distinctiveness of
24 the Birkin mark.

25 The Birkin mark is famous if it is widely recognized

1 by the general consuming public as designating Hermès as the
2 source of goods bearing the mark. In measuring fame, you may
3 consider your own experience, as well as the extent, history,
4 and geographic reach of advertising and publicity of the mark
5 (both by Hermès or third parties), the amount, volume, and
6 geographic reach of sales of products bearing the mark, the
7 extent to which members of the public actually recognize the
8 mark, and whether the mark was federally registered.

9 If you determine Hermès Birkin mark is famous and has
10 been famous since before Mr. Rothschild began selling the
11 MetaBirkins NFTs, you must consider whether Mr. Rothschild's
12 use of the MetaBirkins name and images associated with it are
13 likely to dilute the distinctiveness of the Birkin mark.

14 In determining whether such dilution is likely to
15 occur, you may consider all relevant factors, including, for
16 example:

17 The degree to which Mr. Rothschild's use of the Birkin
18 mark is similar to Hermès' use of the Birkin mark;

19 The strength of the Birkin mark, which you should
20 evaluate as described in Instruction No. 11;

21 The degree to which the Birkin mark is widely
22 recognized;

23 Whether Mr. Rothschild intended to create an
24 association with the Birkin mark;

25 Any actual association by consumers of the MetaBirkins

1 NFTs with the Birkin mark.

2 You may also consider any other relevant factors, and
3 you should remember that no one of these factors is conclusive.
4 Your task is to consider whether, after considering these
5 factors and any others you find relevant, Hermès has proved
6 that Mr. Rothschild's use of the Birkin mark is more likely
7 than not to dilute the distinctiveness of the Birkin mark.

8 Finally, Hermès alleges that Rothschild engaged in
9 cybersquatting through his use of the domain name
10 metabirkins.com for his website. To prevail on this claim,
11 Hermès must prove the following three elements: (1) that the
12 Birkin mark was distinctive at the time the domain name
13 metabirkins.com was registered; (2) that the metabirkins.com
14 domain name is identical to, or confusingly similar to, Hermès
15 Birkin mark; and (3) that Mason Rothschild had a bad faith
16 intent to profit from the Birkin mark.

17 In determining where Mr. Rothschild acted in bad faith
18 on this claim, you may consider whether Mr. Rothschild used the
19 domain name in connection with the offering of any goods or
20 products and whether he intended to divert customers from the
21 mark owner's online location to a site that could harm the
22 goodwill represented by the Birkin mark, either for commercial
23 gain or with the intent to tarnish or disparage the mark. If
24 you find that Mr. Rothschild had reasonable grounds to believe
25 that the use of this domain was lawful, you must find that he

1 did not act in bad faith.

2 If, and only if, you find Mr. Rothschild is liable for
3 any one or more of the three claims described above, you must
4 then consider whether, nonetheless, Mr. Rothschild is protected
5 from liability on any claim because, in creating the
6 MetaBirkins NFTs, he engaged in artistic expression protected
7 by the First Amendment to the U.S. Constitution.

8 It must be clear to you by now that the parties
9 disagree about the degree to which the MetaBirkins NFTs are
10 works of artistic expression. Mr. Rothschild contends that,
11 because he started the project primarily for artistic reasons,
12 the NFTs are paradigmatic works of art. Hermès asserts that
13 any artistic expression is incidental at best, and
14 Mr. Rothschild's real intention was to confuse people into
15 thinking that his MetaBirkins NFTs were sponsored by or
16 associated with Hermès.

17 It is undisputed, however, that the MetaBirkins NFTs,
18 including the associated images, are in at least some respects
19 works of artistic expression, such as, for example, in their
20 addition of a total fur covering to the Birkin bag images.
21 Given that, Mr. Rothschild is protected from liability on any
22 of Hermès' claims unless Hermès proves by a preponderance of
23 the evidence that Mr. Rothschild many use of the Birkin mark
24 was not just likely to confuse potential consumers, but was
25 intentionally designed to mislead potential consumers into

1 believing that Hermès was associated with Mr. Rothschild's
2 MetaBirkins project. In other words, if Hermès proves that
3 Mr. Rothschild actually intended to confuse potential
4 customers, he has waived any First Amendment protection.

5 Therefore, in your verdict form, you will first
6 indicate whether Mr. Rothschild is liable for any one or more
7 of Hermès' claims under the instructions set forth in
8 Instructions 11, 12 and 13. But if you do find Mr. Rothschild
9 liable for one or more of these claims, you must then indicate
10 on the verdict form, in accordance with Instruction 14, whether
11 Mr. Rothschild is nonetheless protected from liability by
12 reason of his First Amendment protection.

13 If you find Mr. Rothschild liable for trademark
14 infringement and/or trademark dilution, and if you further find
15 that Hermès has overcome Mr. Rothschild's First Amendment
16 protection by proving that his use of the Birkin mark was
17 intentionally misleading, you must award Hermès the profits you
18 determine that Mr. Rothschild earned as a result of his
19 infringement and/or dilution. You should measure such profits
20 as the difference between Mr. Rothschild's total sales of any
21 MetaBirkins NFTs that you determine infringed and/or diluted
22 Hermès' Birkin mark and the expenses Mr. Rothschild incurred in
23 order to make those sales. The burden is on Hermès show by the
24 preponderance of the credible evidence the amount
25 Mr. Rothschild received from selling the MetaBirkins NFTs,

1 while the burden is on Mr. Rothschild to show by the
2 preponderance of the credible evidence the expenses he incurred
3 in order to sell the MetaBirkins NFTs.

4 If you find Mr. Rothschild liable for cybersquatting
5 and if you further find that Hermès has overcome
6 Mr. Rothschild's First Amendment protection by proving that his
7 use of the Birkin mark was intentionally misleading, you may
8 then award what are called statutory damages for the
9 cybersquatting. The amount you may award as statutory damages
10 is not less than \$1,000, and not more than \$100,000. In
11 determining the exact amount of statutory damages, you may
12 consider what amount may be necessary to penalize
13 Mr. Rothschild for the use of the domain name and deter future
14 cybersquatting.

15 You will shortly retire to the jury room to begin your
16 deliberations. As soon as you get to the jury room, please
17 select one of your number as the foreperson, to preside over
18 your deliberations and to serve as your spokesperson if you
19 need to communicate with the Court.

20 You will be bringing with you into the jury room a
21 copy of my instructions of law and a verdict form on which to
22 record your verdict.

23 Let me pause there and show you the verdict form. It
24 is very simple. For each of the three claims you check the box
25 either liable or not liable.

1 If you check any of them as liable, then you consider
2 the First Amendment protection and decide whether or not
3 nevertheless that bars the claim or not.

4 And, finally, if you decide that there is liability
5 and that the First Amendment protection does not apply, then
6 you determine first for the infringement and dilution claims an
7 amount of damages.

8 So there is a dollar sign and you fill in an amount.

9 And then separately, for the cybersquatting claim, if
10 you find liability on that claim, statutory damages, and you
11 again put in the amount.

12 After you have filled out those questions, your
13 foreperson will then sign the verdict form, date it, seal it in
14 this envelope very cleverly marked verdict, and then it will be
15 brought to me. But I will not open it until you are all back
16 here in the courtroom.

17 And then either I or my courtroom deputy will read it
18 to you and ask each of you individually whether that is in fact
19 your verdict. The reason we go through all those
20 technicalities is to be absolutely sure we have your verdict as
21 you have decided it.

22 So let's go back to the instructions.

23 In addition, we will send you into the jury room all
24 the documentary and physical exhibits that were admitted into
25 evidence, along with an index so you can locate what you might

1 want. If want any of the testimony, that can also be provided,
2 in either transcript or readback form. But please remember
3 that it is not always easy to locate what you might want, so be
4 as specific as you possibly can be in requesting portions of
5 testimony. Also, if you want any of the videotapes replayed,
6 please let us know, and we will bring you back into the
7 courtroom to see the relevant videotape.

8 Any of your requests, in fact, any communication with
9 the Court should be made to me in writing, signed by your
10 foreperson, and given to the marshal, who will be available
11 outside the jury room throughout your deliberations. After
12 consulting with counsel, I will respond to any question or
13 request that you have as promptly as possible, either in
14 writing or by having you return to the courtroom so that I can
15 speak with you in person.

16 You should not, however, tell me or anyone else how
17 the jury stands on any issue until you have reached your
18 verdict and recorded it to your verdict form.

19 Each of you must decide the case for yourself, after
20 consideration with your fellow jurors of the evidence in the
21 case, and your verdict must be unanimous. In deliberating,
22 bear in mind that, while each juror is entitled to his or her
23 opinion, you should exchange views with your fellow jurors.
24 That is the very purpose of jury deliberation -- to discuss and
25 consider the evidence; to listen to the arguments of fellow

1 jurors; to present your individual views; to consult with one
2 another; and to reach a verdict based solely and wholly on the
3 evidence.

4 If after carefully considering all the evidence and
5 the arguments of your fellow juror, you entertain a
6 conscientious views that differs from the others, you are not
7 to yield your view simply because you are outnumbered. On the
8 other hand, you should not hesitate to change or modify an
9 earlier view that, after discussion with your fellow jurors,
10 now appears to you erroneous. In short, your verdict must
11 reflect your individual views and it must also be unanimous.

12 This completes my instructions of law.

13 Now, all objections previously made to the charge are
14 deemed renewed at this time and preserved.

15 Is there any other reason why counsel needs to
16 approach the sidebar?

17 MR. WARSHAVSKY: Yes, your Honor.

18 THE COURT: Yes?

19 MR. WARSHAVSKY: For a moment, yes.

20 THE COURT: Go ahead.

21 (At sidebar)

22 MR. WARSHAVSKY: Your Honor, this is a bit picayune, I
23 acknowledge, but I think during closing there was might have
24 been some confusion based on defendant's argument about Ether
25 versus U.S. dollars. It just occurred to me as you were

1 reading it, the damages section, that damages should be in U.S.
2 dollars. I don't know if that's a big deal or not.

3 THE COURT: I think there is a dollar sign right there
4 in the verdict form.

5 MR. WARSHAVSKY: I think so, too. I didn't have the
6 verdict form. It just hit me. I apologize.

7 THE COURT: I think that's obvious. I am sure if the
8 jury has any question in that regard, they will let us know.

9 MR. WARSHAVSKY: I'm really sorry to do that.

10 THE COURT: That's all right.

11 (In open court)

12 THE COURT: A couple of other housekeeping matters,
13 and we will then swear in the marshal.

14 You can take as little or as long as you want to reach
15 a verdict. If you haven't reached a verdict by 4:30 today, you
16 should all go home and come back at 9:30 tomorrow, and your
17 foreperson should make sure that all nine of you are here
18 before you begin your deliberations again.

19 If either today or tomorrow you want to stay after
20 4:30, we can arrange that for at least until 5:30, probably not
21 beyond. But we need to know by 4:15, if that's the case, that
22 you want that extra hour today or tomorrow.

23 And as I say to every jury, how long you take is
24 totally up to you. You can take five minutes; you can take ten
25 days. I don't particularly recommend either of those extremes

1 but it is entirely up to you.

2 Okay. Let's swear in the marshal.

3 (Marshal sworn)

4 THE DEPUTY CLERK: Jurors, please follow the marshal
5 back into the jury room.

6 (The jury retired to deliberate upon a verdict at 2:51
7 p.m.)

8 THE COURT: Please be seated.

9 My practice while the jury is deliberating is that
10 there needs to be at least one counsel from each side either
11 present in the courtroom or immediately outside on this floor.
12 If other counsel want to go elsewhere, that's fine, but I
13 always need to have at least one person who we can consult with
14 immediately if we need to respond to any notes.

15 The only exception will be, if we go over to tomorrow
16 or any later day, I will let the jury know at that time that
17 counsel are excused for lunch from 1 to 2 so they won't expect
18 any responses to any questions during that time.

19 I want to thank all counsel in this case. I have no
20 idea how this case will turn out, which is the way I like it,
21 but I thought all counsel did an excellent job, and I'm very
22 grateful to you for that.

23 We will all stay tuned.

24 So unless any counsel has anything further to raise --
25 yes, sir?

1 MR. SPRIGMAN: Your Honor, on Friday you mentioned
2 that we will have additional argument on JMOL.

3 THE COURT: This is the moment.

4 MR. SPRIGMAN: It is down to intent, your Honor. You
5 made it clear in instruction No. 14, right or wrong, that this
6 case comes down to Mr. Rothschild's intent. In fact, you set a
7 very high standard for Hermès to establish that intent.

8 That intent is that Hermès must prove that
9 Mr. Rothschild's use of the Birkin mark was not just likely to
10 confuse potential consumers, but was intentionally designed to
11 mislead potential consumers into believing that Hermès was
12 associated with Mr. Rothschild's MetaBirkins project.

13 Now, your Honor, we agreed to that instruction because
14 we understood, we acknowledged based on last Friday's exchange
15 that I had with you and based on the hypothetical that you
16 offered to me that your concern was that someone who is just
17 basically a scammer should not be taking advantage of First
18 Amendment protection to perpetuate a scam.

19 We understand that, your Honor. Right or wrong as a
20 matter ever law, we understand the concern. Based on that
21 concern, and based on the way that you revised your instruction
22 to reflect it, I want to give you three reasons, your Honor,
23 why in my view no rational jury could find on the objective
24 evidence in this case, whether they believe Mr. Rothschild or
25 not, no rational jury could find on the objective evidence in

1 this case that Mr. Rothschild intentionally designed his
2 MetaBirkins project, intentionally designed his use of the
3 Birkin mark or the Birkin trade dress to deceive.

4 Now, I have three points. I think I can make them
5 quickly.

6 At the end, I am going ask you to grant us judgment as
7 a matter of law on all of these claims.

8 First, Mr. Martin, the 30(b)(6) witness for this
9 client, has admitted on the stand that there are no explicit
10 statements ever made by Mr. Rothschild inviting people to
11 believe, to conclude that Hermès was connected with the
12 MetaBirkins art project, no explicit statements in public, no
13 explicit statements in private. None.

14 Now, that is very important, your Honor, because the
15 *Rogers* case, whether we agree on it or not -- and I can talk to
16 you, your Honor, about that. I have done a lot more thinking
17 over the weekend. I think I have additional things I can tell
18 you about that, but forget it.

19 Whatever we think about the precise meaning of *Rogers*
20 and its relationship with *Twin Peaks*, those cases are clear
21 that the statements must be, the use of the mark must be
22 explicitly misleading.

23 The fact that there are no explicit statements in this
24 case where Mr. Rothschild went out to the people or even his
25 private contacts and said that his project has anything to do

1 with Hermès other than referencing Hermès, commenting on
2 Hermès, that we think, your Honor, should be dispositive.

3 But that is not all.

4 Mr. Rothschild put his name on this project everywhere
5 he could. The evidence is clear, the objective evidence. They
6 don't have to believe everything he said. They can look at the
7 MetaBirkins website, they can look at the Rarible auction site.
8 Any auction site where he could put his name on it, he did.

9 Mr. Rothschild is the artist. He wanted people to
10 know that. He was proud of it.

11 Mr. Millsaps said that, Mr. Harris said that. It
12 reflects the objective evidence in this case. Mr. Rothschild
13 was talking with tens of thousands of people on his public
14 publicly available, publicly viewable Discord channel for
15 MetaBirkins. Never once did he say to anyone, those are the
16 people who are buying this NFT, those are the people who are in
17 the community that he assembled, around this artwork, never
18 once did he say to them that this artwork was anything other
19 than his work that had any connection whatsoever with Hermès.

20 Mr. Martin admitted that. There is objective evidence
21 in this case that supports that. There is no objective
22 evidence in this case that goes against that. That's point
23 number one.

24 Point number two, every mistake that was made by a
25 newspaper, right, got corrected either by Mr. Rothschild or by

1 Hermès. Reporters are paid to ask questions, and,
2 unfortunately, your Honor, sometimes they make mistakes.

3 THE COURT: No.

4 MR. SPRIGMAN: Hard to believe. I understand. But
5 it's true.

6 Mr. Rothschild or his publicist, Ken Loo, undisputed
7 evidence in this case, went out and tried to correct those
8 errors, not every one of them, but went out and tried to
9 correct those errors.

10 The pricing in this case, your Honor, the pricing of
11 the NFTs does not reflect someone who was simply in it for the
12 money. Mr. Rothschild, the undisputed evidence shows,
13 objective evidence, priced these NFTs initially at .1 ETH,
14 which was about \$450 at the time.

15 He had spent time building up a community around this
16 artwork. He had spent time previewing this artwork. People
17 were excited about this artwork.

18 Dr. Kominers says it's because of the Hermès brand.
19 You know, he doesn't know. This artwork referred to the Hermès
20 brand. People might have perceived a comment.

21 Mr. Rothschild -- I'll get to this at the end -- certainly
22 intended one. Whether he was expressed that as linearly as you
23 or I might like, that's what he intended. I will get to that.

24 The point is he priced this at .1 ETH. People
25 perceived value in it. They bought it, and then they traded it

1 for more. That I would submit to you is not the pricing scheme
2 of someone looking to wring every last dollar out of confusion
3 with Hermès. That is the pricing scheme of an artist who has
4 in mind an artistic experiment which I am about to detail for
5 you.

6 (Continued on next page)

1 MR. SPRIGMAN: That's my second point.

2 Here's my third and to me, your Honor, the most
3 important. This is a First Amendment case. The First
4 Amendment is supposed to provide all of us, including Mason
5 Rothschild, when he makes his art, with breathing room. The
6 First Amendment is not supposed to be a hunting license for
7 companies like Hermès to pick out from thousands of texts and
8 nitpick to death in a courtroom things that Mason Rothschild
9 says to his buddies in private. That's what so much of the
10 testimony in this case has been about, trying to paint
11 Mr. Rothschild as a scammer.

12 I would submit to you, your Honor, that if this case
13 is about intent, as you have made it to be, then if the First
14 Amendment is going to have its day in this courtroom, it should
15 be with you. And the way you should do it, I'm asking you, is
16 to give Mr. Rothschild and artists like him who may not guard
17 every word, who may not think in advance of any possible misuse
18 and permutation that can be made by the people that they've
19 angered, give them the breathing room to be artists and not
20 lawyers.

21 Mr. Rothschild gave an interview to *Yahoo! News*. And
22 you may remember, your Honor, months and months and months ago,
23 when my colleague Rebecca Tushnet gave an argument to you on a
24 motion to dismiss, the other side made a big deal about that
25 *Yahoo! News* interview. That *Yahoo! News* interview, I will

1 submit to you, your Honor, captures the intuition that
2 Mr. Rothschild had that was the concept that underlie this
3 conceptual art project from the start, which is, Hermès has
4 those bags sitting on that table the entire time showing them
5 to the jury. They are extremely proud of those bags, which
6 take 18 to 24 hours to make. They market those bags for tens
7 of thousands of dollars to wealthy consumers. And the story
8 they tell is that this is an authentic product that is a work
9 of art and a work of craft.

10 Mr. Rothschild, whether he fully understood it or not,
11 whether he fully intended it or not, asked a question to the
12 world about what people are doing when they spend \$50,000,
13 \$80,000 on a piece of cow hide. Are they purchasing the 18 to
14 24 hours of craftsmanship or are they purchasing an image?
15 Mr. Rothschild's art asks that question. This is the
16 experiment, he said. I'm going to put these out into the world
17 and I'm going to see how the community values them. Do they
18 value, as it turns out, the image the same way they value the
19 bag?

20 You know, whether he fully thought through and
21 articulated it the way you or I might, people who work with
22 words every day, the precise contours of the artistic
23 experiment is, I would submit to you, if the First Amendment is
24 going to give artists breathing room, immaterial. We, I think,
25 can perceive it. The words can be understood in this way.

1 The experiment worked. It showed that for many of
2 these people, they value the image. It will be interesting in
3 the world as we live on to see whether Hermès in the end
4 suffers from this. But if they suffer from this, they will
5 suffer from the critique.

6 The First Amendment does not allow Hermès to sue
7 because it might suffer from critique. This is an argument,
8 your Honor, we made to you on motion to dismiss; this is an
9 argument we made to you on summary judgment.

10 We have, in this case, proceeded over months and at
11 enormous expense to arrive at this moment where this question
12 of intent curiously turns all the way back around to where we
13 started, which is Mason Rothschild's intent was to act as
14 artists do. It was to ask questions about the world in which
15 we live, which includes whether any of us like it or not,
16 50,000, 60,000, and up dollar handbags. That's the question he
17 asked. We got an answer, and here we are in court trying to
18 explain it.

19 I think we've explained it, your Honor. And I think
20 we've explained it in a way that no rational jury can disagree
21 with. If the First Amendment is going to have a role in
22 protecting artistic expression against this kind of thing, I'm
23 asking you, I'm begging you, grant us a JMOL.

24 THE COURT: You feel strongly about it obviously.

25 MR. SPRIGMAN: I do.

1 THE COURT: And here I thought law professors were
2 without emotions.

3 So the record should reflect my beloved brother is a
4 law professor, so that was just a joke.

5 Let me hear from plaintiffs' counsel.

6 MR. WARSHAVSKY: Well, your Honor, I definitely agree
7 with Mr. Sprigman that he's made this argument several times.
8 And I think that it still leaves us in the same spot. And I
9 think that each time Mr. Sprigman makes this argument, it's
10 backwards.

11 He starts with a predicate that Mr. Rothschild is
12 doing something legitimate. I think we've shown -- I think you
13 were here during my closing, I think we showed just the
14 opposite. And in most cases, intent is not proved by the words
15 of the individual doing a particular wrong; it's proved by the
16 surrounding circumstances.

17 Here, we have somebody that actually went from a
18 schematic to copy a registered trademark. He also took the
19 name. That's intent to infringe. He actually went and did it.

20 And as to the commentary piece that Mr. Sprigman is
21 talking about, I've never heard that from Mr. Rothschild. In
22 fact, he was on the stand. His attorneys have been saying it,
23 but he has not. What we saw actually was quite a very
24 different intent from Mr. Rothschild.

25 I'm also going to take issue -- both Mr. Millsaps and

1 Mr. Sprigman keep talking about thousands of text messages. We
2 took a look over the weekend. They produced about 400 chains
3 of text messages. And in them, they are rife -- if we went
4 through -- they are not in evidence, I'm not really going to
5 discuss it, but the ones that we've seen are all quite telling.

6 Mr. Rothschild actually goes to his colleagues,
7 Mr. Sprigman calls them his buddies. Mr. Rothschild was on the
8 stand, you read the text, and he says that to one of his
9 buddies he wants to do a collaboration. His buddy says, I
10 don't know why I keep calling his buddies. His potential
11 business partner says, Is it official? He says, Pushing for it
12 right now. Why would he do that? The only reason is because
13 he understands what using the word "Birkin" and using that
14 design entails.

15 Mr. Rothschild told you his intent when talking to
16 investors. He says, I don't think people realize how much I
17 can get away with by saying "in the style of." Here he didn't
18 even say "in the style of." He just went and copied. That's
19 intent.

20 The trademark law is about confusing consumers. And
21 he went and he took Hermès's property and he really did what --
22 well, the term, I guess, I won't use it, but he made a very
23 poor copy and he did it in a way that I think was obvious. And
24 I'm not -- again, I'm not sure that Mr. Sprigman has said
25 anything new here. Every time we've discussed this, we've

1 talked about intent. The fact that Mr. Rothschild says he
2 doesn't have intent, if that were the test, anybody who's ever
3 accused of any sort of tort with an intent element can simply
4 say, I didn't intend to do it. We always prove intent from the
5 surrounding circumstances. And here, the surrounding
6 circumstances are actually quite clear.

7 Mr. Rothschild went to all his business associates and
8 said what he was doing and he copied. And I don't think
9 there's much more to it.

10 And then when we get to it, we can talk about the
11 pumping and chilling, frankly. That, if you read what
12 Mr. Rothschild said, if you heard his testimony, he was doing
13 much more with it. It was a pure economic advantage -- pure
14 economic endeavor, rather. If you are to look at it, it reads
15 a lot like -- I hate to use words like this, because -- but it
16 reads like pump-and-dump; it looks like a true pump-and-dump,
17 right. He's getting people to come in -- but these are
18 articles without any value, that he gets celebrities to come,
19 tell the community, go in and buy them.

20 And we see the texts that he has with it, saying, I'm
21 giving this to you. I'm giving you this whitelist spot. Do a
22 show pose for me. I'm giving you \$50,000. What does that
23 mean? Because that influencer can turn around and sell the bag
24 to someone else, who's stuck with the NFT as the price goes
25 down.

1 So I don't think that anything about this business was
2 legitimate. I frankly question whether there's any art. If
3 you looked at most of what we did, what we showed today, you
4 see one after the other of these Birkins. Other than the
5 covering with fur, they look nearly identical to what Hermès is
6 already doing.

7 So, you know, I understand that Mr. -- from the very
8 beginning, I think we haven't seen eye-to-eye on this, the two
9 sides. And that might be an understatement. But I think
10 that -- I'm not sure how else they would expect to show intent
11 other than for Mr. Rothschild to say, I'm a con artist. That's
12 basically what Mr. Sprigman is saying. Unless he were to say,
13 I'm a con artist or to say to somebody, I'm trying to
14 explicitly mislead, you would always have to grant JMOL. I
15 don't think that's how the law is supposed to work.

16 MR. SPRIGMAN: Your Honor?

17 THE COURT: Yes.

18 MR. SPRIGMAN: Two things.

19 First of all, Mr. Rothschild absolutely did testify to
20 his artistic intent. If you look at page 285 of his testimony,
21 beginning on line 17, there's a question:

22 "Q. When you said that was part of the experiment -- referring
23 to the *Yahoo! News* article, and he used that term -- what did
24 you mean by that?

25 "A. I mean, Hermès Birkin bags are known to be sold for 12,000

1 bucks, you know, a minimum of 12,000 bucks, like they said. So
2 I said, Let me see if I can charge, like, almost nothing for
3 them, like, 450 bucks, and see what the people do with them and
4 see what they value. Is it the image or, like, the product?"

5 Okay. That's the experiment. That's what he said in
6 the *Yahoo! News* interview; that's what he said on the stand.
7 It's been consistent.

8 This point about collaboration, you know, your Honor,
9 I've been puzzled by this point from the start. Mason
10 Rothschild never made -- he never lied about having the
11 collaboration. He wanted a collaboration; he told people he
12 was working on it. He was working on it. He was calling
13 people trying to get to Hermès because, you know, to be
14 truthful, your Honor, he was puzzled as to why they were upset
15 about this.

16 Artists collaborate with Hermès all the time. Hermès
17 spent time telling the jury about how they collaborate with
18 artists. The idea that Mr. Rothschild couldn't collaborate
19 with them or couldn't possibly think that he could collaborate
20 with them doesn't stand up to the evidence that Hermès itself
21 has introduced in this courtroom. It may be that Hermès
22 considers him unworthy, but, you know, that's not
23 Mr. Rothschild's fault nor is it something that he necessarily
24 understands.

25 Look, your Honor, again, the word "explicit" appears

1 in Rogers. The word "explicit" appears in *Twin Peaks*. It is
2 the test. This word "explicit" has got to do something. And
3 the thing that it has to do in this case is that it has to have
4 you asking yourself, did Mason Rothschild ever explicitly tell
5 anybody, public or private, that his MetaBirkins were connected
6 in any way with Hermès? He never said anything public. He
7 never said, for example, your Honor, I'm going to name this
8 project MetaBirkins by Hermès. He never did that. He never
9 did this privately. He never said to someone, when they said,
10 Hey, does this have anything to do with Hermès? He never said,
11 Yeah, it does. Or, you know, They are sponsoring it or they
12 are licensing it or I have their approval. He never said
13 anything like that.

14 What they're reduced to, what Hermès is reduced to, is
15 taking isolated bits of flotsam and jetsam in, I'm sorry, you
16 said several 100 text chains. It's thousands and thousands and
17 thousands of exchanges within those several 100 text chains.
18 And they are cobbling together a narrative that, to be
19 truthful, I mean, your Honor, is -- it is a concoction.

20 If you allow this case to proceed -- I mean, it's gone
21 to the jury, but I'm asking you for a JMOL so that we do not
22 get liability for First Amendment protected artistic speech
23 based on a concoction. We should limit liability in these
24 instances to explicit statements.

25 The rule, your Honor, after hearing you on Friday, I

1 always thought -- well, I thought at least since Friday and I
2 saw it in your jury instructions, the rule is basically this:
3 If you lie, you lose.

4 He didn't lie. He said a bunch of stuff which they
5 are taking and they are weaving into a scathe. That shouldn't
6 be this case. If that's the standard, then artists will be in
7 the dock repeatedly.

8 They are going to put stuff out into the world, 100
9 million bucks of it, worth a year in the United States alone
10 just on the Birkin bag. They are going to relentlessly promote
11 it. It is going to be picked up by the culture because they
12 are good at what they do. And then when the culture talks back
13 to them in some way, they are going to pick and choose who they
14 like and who they don't. They are going to exercise viewpoint
15 discrimination at the end of the day, your Honor, and that is
16 the central problem that the First Amendment is trying to
17 forestall. Don't let them do it.

18 MR. WARSHAVSKY: Can I just respond to two of the
19 points there?

20 THE COURT: Sure.

21 MR. WARSHAVSKY: I've heard from all the counsel --
22 well, not all, but I've heard from both Mr. Millsaps and
23 Mr. Sprigman that Hermès is somehow offended by the pictures
24 themselves. They are not. I don't know where they keep coming
25 up with it. This has always been about a trademark.

1 And I also want to challenge this whole idea of an
2 artistic experiment. We had Mr. Rothschild talk about the fact
3 that he was getting influencers to pump and chill. What's the
4 experiment? That's rigged. There's no experiment. There's no
5 commentary. There's nothing to it.

6 I understand that my adversary is very passionate
7 about it, and I can't say I share it. But what I don't
8 understand is that I suppose is where they are coming up with
9 Mr. Rothschild being persecuted here. Ultimately, there's
10 never been a comment one way or another about Mr. Rothschild's
11 qualities as an artist, if he is one, right.

12 They had four Hermès witnesses on the stand. They
13 didn't ask once what they thought about the art. I don't know
14 what would have been said. I don't know that Hermès ever
15 thought of it. What we know is that Hermès never went after
16 the Baby Birkin. What we know is that in depositions and
17 everywhere else, and we had that as part of our motion *in*
18 *limine*, they were asking about all different uses of the Birkin
19 in pictures and sculptures and this and that. Hermès hasn't
20 gone after any of that.

21 Hermès went after Mr. Rothschild, and I think that
22 that's the biggest challenge we have here and that's, frankly,
23 why I think we struggle so much with *Rogers* is that
24 Mr. Rothschild is building a brand. And I think that what it
25 shows, you know -- I know the defendant has worked very hard to

1 say it's pictures. We've seen much more than that. His use of
2 MetaBirkins, he has a community, he had a -- he basically
3 described a loyalty program. That has nothing to do with art.
4 That's like an airline, right.

5 He has a community where he says anybody who joins,
6 they are going to -- they are going to get whitelists for other
7 spots. He's plugging his other -- what we see is that
8 Mr. Rothschild is plugging his other assignments through that
9 MetaBirkins community. Has nothing to do with art. He's using
10 it as a brand.

11 And I think -- you know, I think the challenge with
12 the way the Rogers test is set up, we were thinking about it
13 over the weekend, too, and we saw a case out of Colorado which
14 had a little bit more of a balancing test. And I realize that
15 ship may have sailed a little bit, but ultimately there's a
16 balancing of rights here. And brand owners aren't without
17 rights. There is the Lanham Act and Congress does have a right
18 to regulate commerce. And this is commercial speech, pure and
19 simple. What Mr. Rothschild was doing was purely commercial
20 speech.

21 And look, we have the jury instruction. But going
22 back to intent, intent is copying somebody. Copying a
23 trademark has one -- a trademark isn't about beauty, it isn't
24 about aesthetic properties; it's about being a signifier of
25 source, period.

1 Mr. Rothschild copied the trademarks, period. He went
2 and did his best to copy them as clearly as possible. I don't
3 know how to be more plain about it. I showed it three times
4 during closing. He took the schematic of the Birkin bag and
5 the Birkin trademark and put it out there. I'm not sure what
6 more you could do to copy a trademark and try to confuse the
7 public. The whole point of the trademark law is to prevent
8 customer confusion. He undertook purposefully that exact
9 activity. If that's not intent to confuse, I don't know what
10 is.

11 MR. SPRIGMAN: Your Honor, video games, TV shows, they
12 are all protected. They are all brands.

13 This is not a brand, MetaBirkins, this is an art
14 collection. If Mr. Rothschild says, I'm the guy who created
15 MetaBirkins and now I'm creating "I Like You, You're Weird,"
16 that is not building a MetaBirkins brand, that is promoting
17 Mr. Rothschild's art. This is two very different things.

18 In terms of him copying the shape of the handbag and
19 copying the Birkin mark into the MetaBirkins name, trademark,
20 as you, your Honor, yourself observed, is not copyright. These
21 are two different things. Mr. Rothschild only violates the
22 trademark law, not if he copies the shape of the Birkin bag.
23 The shape of the Birkin bag is not copyrighted. He's allowed
24 to draw -- the copyright law doesn't say anything about that.

25 He only is guilty of trademark infringement if he

1 confuses. And because he is drawing pictures, the First
2 Amendment raises the bar, as your Honor has recognized,
3 further. His intent must be that he designed the use of the
4 mark to confuse; that he went out there and he did this on
5 purpose; that that was his design.

6 Your Honor, I told you all these aspects of the entire
7 episode that we've been concerned with, objective aspects, not
8 having to do with Mr. Rothschild's testimony, but things that
9 are verifiable in the world just by looking at the MetaBirkins
10 website, by looking at the auction sites, by looking at the
11 prices, by looking at his communications with others that show
12 you, your Honor, that he did not go out to confuse anyone.

13 And I will just end with this: You know a tree by its
14 fruits, okay. What were the fruits here? Very little, if any,
15 confusion. A few reporters asked some questions. A few press
16 outlets, out of all the ones that wrote about this, got it
17 wrong.

18 Dr. Isaacson got up there and gave an account of a
19 survey that, with respect, Dr. Neal took apart piece by piece.
20 At the end of the day, they have failed, even under the
21 ordinary standards, to show confusion. But they have certainly
22 failed to show confusion out in the world at a level that would
23 support an inference that Mr. Rothschild intended to do the
24 thing that you are requiring the jury to find that he did,
25 which is that he designed this thing intentionally to confuse

1 people. You know, if he'd done that, then he's done a very,
2 very bad job.

3 I think at the end of the day, your Honor, all this
4 evidence points in the same direction. It points toward you
5 granting a JMOL on all these claims. Thank you.

6 THE COURT: Well, I am second to none in my admiration
7 for the eloquence of counsel for both sides.

8 I purposely held off ruling on this motion till I
9 heard summations from both sides, because, as I expected, that
10 was the occasion for counsel to draw my attention, as well as
11 the jury's, to specific items of evidence in this case. And
12 it's very important because the First Amendment issue in this
13 case came down, as I've already indicated earlier today, to a
14 question of the defendant's intent. I say that because
15 recognizing the importance of the First Amendment issue in this
16 case, I made determinations in defendant's favor that might
17 arguably have been avoided.

18 For example, even though I think there is a
19 nonfrivolous argument that the defendant was not making use of
20 the MetaBirkins -- excuse me, of the Birkins mark or the
21 Birkins design for artistic purposes and, therefore, would not
22 satisfy the first prong of the *Rogers* test, I concluded in the
23 end that there was at least an element of artistry involved
24 from the outset and so instructed the jury.

25 Similarly, even though I think there is an argument

1 that the use of the term "MetaBirkins" in the website and
2 throughout was explicitly misleading on its face and,
3 therefore, would satisfy the other prong of *Rogers*, I concluded
4 in the end that that was not a question that should go to the
5 jury in those terms because of the breadth that must be given
6 to artistic expression and constitutionally protected rights
7 under the First Amendment.

8 But I think now defense counsel goes too far in
9 suggesting that no rational juror could find for plaintiff. In
10 the end, I found that Mr. Rothschild would be entitled to his
11 First Amendment protection unless plaintiff could prove that
12 his intent was to deceive the persons to whom he was
13 advertising his product and make them believe that it was an
14 Hermès product. And if he did that, as I have already
15 indicated, and I think implicitly both counsel have agreed,
16 then he forfeited the First Amendment protection to which he
17 otherwise might be entitled.

18 Notwithstanding the excellent arguments just made by
19 defense counsel, I think there is ample evidence from which a
20 jury could conclude that Mr. Rothschild is a classic conman;
21 it's just that he's not yet gotten good enough to avoid, for
22 example, revealing what's really in his heart in emails that he
23 believes are private at the time. But, nevertheless, there is
24 ample evidence from which a rational juror could, if they wish
25 – and there's certainly contrary evidence as well – conclude

1 that he set out or very early came to the conclusion that he
2 could fool people into believing that his product and his site
3 and his NFTs were sponsored by Hermès. And at that point, if
4 the jury were to so conclude, that's the end of what remains of
5 the First Amendment argument, notwithstanding the many respects
6 in which I have leaned over in favor of that argument as
7 reflected in my charge.

8 I think as to the elements of confusion and so forth,
9 it's not even a close question. There is plenty of evidence on
10 both sides, and the jury will have to make the classic jury
11 analysis through a multifactor test. The very nature of these
12 multifactor tests in the various substantive counts illustrates
13 how it is the intention of the courts to leave these matters
14 largely to the collective wisdom of a jury.

15 When you have seven, eight *Polaroid* factors and the
16 jury is instructed, as the law requires, that, number one, they
17 can weigh them as ever they choose; number two, none of them is
18 dispositive; number three, they can also take into account any
19 other factor they find relevant, that is the kind of law that
20 says, We the people of the United States believe in our jury
21 system and we're leaving that balancing to the voice of a
22 community as reflected in citizens good and true who come here
23 and serve on juries. And I think that's equally true of every
24 issue in this case.

25 The three substantive counts are all multifactor

1 tests. The First Amendment, even after my rulings in favor of
2 the defense on so many aspects of the *Rogers* test, still leaves
3 open the question, which is a classic jury question: What was
4 really in the heart and mind of this defendant? And the laws
5 of the United States in 100 different situations leaves that
6 question to jurors.

7 I do think – and I'm not sure the Supreme Court is
8 going to agree – in the *Jack Daniels* case that there are very
9 important First Amendment protections here that must be
10 safeguarded. And that is because not just the letter of the
11 First Amendment, but the spirit of the First Amendment.
12 Artists in so many respects are commentators on our society and
13 that has been part of their historic role. That's not the only
14 role they play. There are portrait artists who have a
15 different aspect and they are equally artists.

16 But it is critical that we leave room for social
17 commentary, whether it comes verbally or in the form of art,
18 and make sure that is not easily defeated. But none of that
19 applies to a swindler, a fraudster who makes one pretense or
20 another, but reveals in his emails and his behavior what is
21 really in his heart, which is to cheat people. And I think the
22 jury here could find either possibility, but certainly could
23 find that Mr. Rothschild fit that pattern.

24 So the motion, the Rule 50 motion of the defense and
25 also, while I'm at it, the Rule 50 motion of the plaintiff, is

1 denied. And we will leave it to the jury to make their
2 decision. Thanks very much.

3 (Recess pending verdict)

4 THE COURT: All right. We have a note from the jury
5 which we've marked as Jury Note No. 1. It says: We need the
6 cease and desist letter please, and corresponding materials of
7 back and forth. And then it says C-O-M-M-S, which I think
8 means communications.

9 So my understanding is they already have the cease and
10 desist letter. What is the number?

11 MR. WARSHAVSKY: It's No. 20, your Honor.

12 THE COURT: Plaintiffs' 20?

13 MR. WARSHAVSKY: Yes. And Plaintiffs' 21 is the
14 response. And that's all in the record.

15 THE COURT: All right.

16 MR. MILLSAPS: Your Honor, there is testimony in the
17 record about this, if they are asking for materials on
18 communications --

19 THE COURT: No, they say and -- it's a little
20 ambiguous. Here's what I suggest: Since it's already 4:18,
21 that we send them a note which I'll dictate in a moment to
22 myself, telling them of the two exhibits and asking them to
23 specify what else they want and we will have it for them first
24 thing tomorrow. They can get it back to us before 4:30.

25 So let me try that. Hold on.

1 All right. So the cease and desist letter is
2 Plaintiffs' Exhibit 20, and the response from Mr. Rothschild is
3 21?

4 MR. WARSHAVSKY: Yes, your Honor.

5 THE COURT: To the jury: The cease and desist letter
6 is Plaintiffs' Exhibit 20, and Mr. Rothschild's response is
7 Plaintiffs' Exhibit 21, both of which you should already have.
8 If you need anything else in this regard, please let us know
9 before you depart at 4:30 p.m., so that we can send it to you
10 promptly at 9:30 a.m. tomorrow. Signed, Judge Rakoff.

11 Any problems with that from either counsel?

12 MR. WARSHAVSKY: Not from plaintiff, your Honor.

13 MR. MILLSAPS: Not from defendant, your Honor.

14 THE COURT: Very good.

15 So I'll give it to my courtroom deputy, who will take
16 it immediately to the marshal to give to the jury.

17 All right. Why don't you stick around to like 4:35 in
18 case they do send us another request. And then if we haven't
19 received anything, you can all leave and, lucky you, you don't
20 have to be here before 9:30 tomorrow because we don't have
21 anything else to occupy ourselves. I will miss you, of course,
22 but I'll bear up.

23 Okay. Real good. Thanks a lot.

24 (Recess pending verdict)

25 THE COURT: Please be seated.

1 So we've received another note which we've marked as
2 Jury Note 2, which reads: Hello, is it possible to find out
3 when Hermès applied for a digital trademark? We only have
4 notes from testimony that it exists. Signed Jane Kramer, who I
5 understand is Juror No. 8. Maybe it's not Jane, maybe it's
6 Janna, I'm not sure, but anyway. So I take it --

7 THE DEPUTY CLERK: Jane.

8 THE COURT: It is Jane. Okay.

9 I take it both sides agree this never came into
10 evidence; correct?

11 MR. WARSHAVSKY: That's correct, your Honor.

12 MR. MILLSAPS: Correct, your Honor.

13 THE COURT: The jury has left.

14 But let me draft something.

15 Okay. Here is my note, which will be delivered to
16 them by my courtroom deputy the very first thing tomorrow:

17 To the jury, welcome back. In answer to your inquiry
18 of late yesterday as to when Hermès applied for a digital
19 trademark, the answer is not in evidence and therefore cannot
20 be furnished to you.

21 Any problems with that from either counsel?

22 MR. WARSHAVSKY: Not from plaintiff, your Honor.

23 MR. MILLSAPS: Not from defendant.

24 THE COURT: Okay. I'll give it now to my courtroom
25 deputy to give to the marshal to give to the jury the very

1 first thing tomorrow.

2 All right. So you guys are excused and I will look
3 forward to seeing you tomorrow.

4 MR. WARSHAVSKY: Thank you.

5 (Adjourned to February 7, 2023 at 9:30 a.m.)
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